

John Aikin's
6120.9.4.
R E P O R T S
of Aikin's
DIVERS SPECIAL CASES,

ADJUDGED IN THE
COURTS OF KING'S BENCH, COMMON PLEAS,
AND EXCHEQUER,
IN THE
REIGN OF KING CHARLES II.

COLLECTED BY
SIR THOMAS RAYMOND, KNIGHT,
LATE ONE OF THE JUDGES OF THE KING'S BENCH AND COMMON
PLEAS, AND ONE OF THE BARONS OF THE EXCHEQUER.

PRINTED FROM THE ORIGINAL MS. WRITTEN WITH HIS OWN HAND.

THE THIRD EDITION,
WITH MANY HUNDRED ADDITIONAL REFERENCES, AND
THREE TABLES.

THE FIRST—OF THE NAMES OF THE CASES.
THE SECOND—OF ALPHABETICAL HEADS TO WHICH THE CASES RELATE.
THE THIRD—OF THE PRINCIPAL MATTERS.

D U B L I N :

PRINTED BY JAMES MOORE, NO. 45, COLLEGE-GREEN.

1793.

REPORTS

DIVERS SPECIAL CASES

ADJUDGED IN THE

COURTS OF KING BENCH, COMMON PLEAS
AND EXCHEQUER

IN THE

REIGN OF KING CHARLES II

COLLECTED BY

SIR THOMAS D. LEIGHT



WITH ONE OF THE JUDGES OF KING BENCH AND COMMON
PLEAS, AND ONE OF THE JUDGES OF THE EXCHEQUER

PRINTED FROM THE PRESS OF THE UNIVERSITY OF OXFORD

THE THIRD EDITION

WITH MANY ADDITIONAL REFERENCES AND

THESE CASES

THESE CASES ARE THE PROPERTY OF THE BODLEIAN LIBRARY, OXFORD

A TABLE of the Names of the CASES.

A.		Lady Broughton's Case,		Page 216
A	DAMS <i>versus</i> Tomlinson,	Page	Broughton v. Vesey,	182
	Aglionby v. Towerfon,	100	Brown v. Cutter,	427
	Allot v. Jackson,	400	Bucks v. Angel,	123
	Amcots v. Amcots,	327	Buckworth's Case,	170
	Amherst's Case,	118	Burnet v. Holden,	210
	Andrews v. Showel.	214	Burton v. Robinson,	124
	Angel v. Cleypole,	18	Buxton v. Bateman,	52
	Attorney General v. Sir E. James,	244	C.	
	v. Blood,	241	Capenhurst v. Capenhurst,	27
		417	Carpenter v. Marthal,	90
		412	Carpenter's Case,	439
		Carley v. Wood,	249	
Ayres's Case,	160	Cartlidge v. Maudlin,	392	
Austin v. Mander.	20	Carter v. Crawley,	496	
B.		Cafe v. Barber,	450	
Baily v. Birtles,	71	Celier's Case,	309	
Baker's Case,	219	Chiffer's Case,	275	
Baker v. Bullstrode,	232	Chichester's v. Phillips,	404	
Baker v. Berisford,	58	Charleton v. Tinney,	98	
Bambridge v. Bates, &c. 305,	328,	Chamberlain v. Prescott,	135	
	337	Chester v. Willan,	187	
Barker <i>versus</i> Durrant,	169	Clerk v. Molineux,	100	
Barnard v. Evans,	14	Viscount Clare v. Clench,	372	
Barnington v. Venables,	34	Cole v. Ireland,	360	
Bateman and Lawrence v. Swift,	1	Cock v. Honychurch,	203	
Bale v. Amherst and Norton,	82	Cockman v. Tanner,	468	
Sir Edw. Bathurst v. Cox,	68	Collins v. Walker,	50	
Baynes v. Belfon,	247	Cook v. Newcomb,	42	
Bellew and Norman's Case,	234	Copping v. Honie,	117	
Benson v. Hodson,	236	Corbet v. Stone,	140	
Beming v. Follat,	430	Crouch v. Falstaff,	418	
Bilton v. Johnson,	161	Craft v. Winter,	180	
Bishop of Exon and Masters v.		Crispe v. Mayor of Berwick,	173	
Star,	225	Cutforthay v. Taylor,	395	
Billing's Case.	58	D.		
Black v. Mole,	18	Day v. Guilford,	19	
Blacket v. Lumley,	217	Davison v. Hanslop,	211	
Bland v. Levit,	193	Dacy v. Linch,	35	
Bolus v. Hinstock,	192	Danby v. Palmes,	172	
Boylestone v. Ratcliff,	5	Davies v. Jones,	62	
Boone's Case,	470	Delabarre v. Delaval, &c.	42	
Bowman v. Milbank,	97	Delcoven v. Mascall,	205	
Braham v. Aspinall,	66	Dethick v. Bradborn,	5	
Bradley v. Hutchinson,	230	Designy's Case,	474	
Bray v. Whitelage,	335	Dean and Chapter of Windsor v.		
Bretton v. Prettiman,	153	Gower,	194	
Brocket's Case,	97	Dighton's Case,	183	
Brogan v. Aunger,	387	Dinsdale v. Iles,	224	
Brooks v. Hague,	245			

A Table of the Names of the Cases.

Dixon <i>versus</i> Killigrew,	Page 152	Sir H. Harbert <i>versus</i> Paget	Page 53
Doddesworth <i>v.</i> Anderson,	375	Harvey <i>vs</i> Harvey,	366
Dod <i>v.</i> Inglefield,	277	Harvy's <i>Case</i> ,	153
Dove <i>v.</i> Darkin,	59	Harvey <i>v.</i> Martin,	75
Draper <i>v.</i> Blaney,	206	Hatton <i>v.</i> Maskew,	198
Drake <i>v.</i> Hill,	184	Hayman <i>v.</i> Truant,	199
Dulton <i>v.</i> Pool,	302	Hawes <i>v.</i> Wheeler,	81
Dumford <i>v.</i> Irish,	395	Herbert <i>v.</i> Tuckal,	84
Duncomb and Singleton <i>v.</i> W.		Sir And. Henley <i>v.</i> Burfial,	180
Walter,	479	Hinchcliffe <i>v.</i> L. Beamount,	425
Dunkin <i>v.</i> Man.	235	Hitchins <i>v.</i> Stevens,	487
E.		Hodges <i>v.</i> Hodges,	51
Eden <i>v.</i> Chalkal,	25	Hole <i>v.</i> Bradford,	57
Edfar <i>v.</i> Smart,	26	Holmes <i>v.</i> Maynel,	452
Ekins <i>v.</i> Smith,	336	Horfeley <i>v.</i> Potton,	187
Eliot <i>v.</i> Blake,	65	Horton <i>v.</i> Narfant,	392
Ellis <i>v.</i> Winne,	191	Houghton's <i>Case</i> ,	215
Ellison <i>v.</i> Ellison,	38	Mr. Howard's <i>Case</i> ,	13
Englefield and Smith's <i>Case</i> .	440	Hughes <i>v.</i> Cornelius,	473
Errington <i>v.</i> Hurst,	124	Hunt <i>v.</i> Wotton,	259
F.		Hunt <i>v.</i> Danvers,	370
Far's <i>Case</i> ,	81	J.	
Ferrar's <i>Case</i> ,	84	James <i>v.</i> Richardson,	330
Fitch <i>v.</i> Vinor,	73	Jemot <i>v.</i> Cooley,	135. 158
Fitch <i>v.</i> Smalbroke,	32	Jenny <i>v.</i> Sir A. Jenny,	8
Fletcher's <i>Case</i> ,	458	Johnson <i>v.</i> Taylor,	431
Ford <i>v.</i> Welden,	91	Johnson <i>v.</i> Samworth,	13
Fosset <i>v.</i> Franklin,	225	Johnson <i>v.</i> Colfson,	250
Foster <i>v.</i> Foster.	43	Johnson <i>v.</i> Grant,	252
Foxwift <i>v.</i> Tremain,	198	Jones <i>v.</i> Powel,	196
French <i>v.</i> Rent,	33	Joyner <i>v.</i> Sir Robert Viner,	415
Fiere's <i>Case</i>	186	K.	
G.		Keys <i>v.</i> Bradon,	93
Gardiner's <i>Case</i> ,	288	King <i>v.</i> Welby,	217
Gibs <i>v.</i> Stratford,	204	King <i>v.</i> ———,	238
Glinifter <i>v.</i> Audley,	14	The King <i>v.</i> Allen,	196
Godlington <i>v.</i> Lee,	<i>ibid.</i>	Alfop,	378
Goodyear <i>v.</i> Banks.	194	Bishop,	385
Gray <i>v.</i> Day,	418	Brown,	208
Graves <i>v.</i> Sawcer,	15	Burgess,	84
Granger <i>v.</i> Hemborough,	22	Earl of Castlemain,	379
Griffith <i>v.</i> Goodhand,	464	City of Canterbury,	113
Grig's <i>Case</i> ,	1	Earl of Dorset,	154.
Guilbert <i>v.</i> Martin,	85		177
Guilliam <i>v.</i> Mannington,	200	Gillifer,	65
Guy <i>v.</i> Dormer,	295	Farr,	276
H.		Hardy,	67
Haddock's <i>Case</i> ,	435	Higgins,	484
Hambleton <i>v.</i> Beer,	200	The inhabitants of	
Harris's <i>Case</i> ,	23	Bitton,	487
Harrison <i>v.</i> Grovener,	269	The	
Harrison <i>v.</i> Belfey,	413		

A Table of the Names of the Cases.

The King v. The Inhabitants of Essex,	Page 384	Moss <i>versus</i> Slue,	Page 220
Ladlingham, 193, 205		Mosely v. Middleton,	222
Middleton, 115		Mould v. Wallis,	60
More, 196		Muney v. Eiston, 260, 286, 319, 338	
Munson, 376		Murch v. Lands,	79
Ocullean, 377		Muschamp v. Aston,	368
Pemlington, 375		Mustard v. Hornden,	390
Read, 34		N.	
Saunders, 201		Nappier v. Curtis,	326
Sykes, 202		Nedham v. Bennet,	171
Tempest, 386		Newce v. Packer,	5
Wagstaff, 138		Nicholson v. Sherman,	23
Wild, 191		Norfolk v. Aylmer,	62
Wright, 74		Norris v. Baifield,	398
Kingdon v. Viscount Ranelagh, 459		Nurse v. Barnes,	77
Kirton v. Guilder, 360		Nuttal v. Page,	17
Kitchin and Knight v. Buckley, 80		O.	
Knight v. Buckley, 162		Opey v. Thomasius,	132
Knight v. Peachy and Freeman, 303		Okcover v. Overbury,	231
L.		Okerden v. Keynel,	391, 465
Lambert and Olliot v. Beffet, 421, 465		Orton v. Fuller,	51
Langley v. Chute, 246		Oshorn v. Wandel,	414
Laffels v. Chatterton, 190		Oseley v. Sir G. Warburton,	221
Lawson v. Witherington, 61		P.	
-Lee v. Raynes, 86		Palmer v. Flethees,	87
Lee v. Garret, 416		Palmer v. Stavick,	21
Leech's Case, 99		Palmer v. Richard,	64
Leeson v. Dower, 420		Par v. Evans,	78
Lille v. Grey, 278, 302, 315		Parsons v. Cottrel,	399
Littleboy v. Wright, 63		Patrick's Case,	101
Lomax v. Armourer, 233		Pain v. Minthal,	6
Long's Case, 191		Pawlet's Case,	335
Long v. Emot, 81		Pemble v. Steme,	165
Low v. Beardmore, 135		Pheasant v. Finch,	394
Lucas v. How, 250		Phorbe's Case,	433
M.		Pierfon v. Ridley,	204
Manafon's Case, 365		Player v. Vere,	288, 324
Manfer v. Shelley, 69		Plunket v. Holmes,	28
Mason v. Jennings, 401		Pout v. Pout,	249
Sir Drayner Maffingford's Case, 219		Pordage v. Cole,	183
Mark v. Johnson, 137		Powel v. Row,	202
May v. Spencer, 50		Prideux v. Wame,	232
Mayor of Barnstable's Case, 143		Pritchard's Case,	120
Merrel v. Rumsfy, 126		Price v. Croft,	180
Metroyn v. The Hundred of Ifleworth, 221		Put and Hardy v. Rausterne,	472
Michel v. Bisby, 189		Pybus v. Mitford,	228
Mildmay v. Cafe, 220		R.	
Mill's Case, 152		Rawlins v. Hill,	12
Morgan v. Man, 94		Road v. Grapler,	38
Morgan v. Vaughan, 456		Reynolds v. Burtcn,	4
		Rider v. Hill,	389
		Rimes v. Baker,	100
		Rinch's Case,	189
		Ridley	

A Table of the Names of the Cases.

Risley <i>versus</i> Lady Baltinglass, P. 240	Thatcher <i>versus</i> Ulloke, Page 137
Robins v. Cox and Warwick, 11	Tibs v. Smith, 33
Robinson v. Amps, 25	Tippin v. Grover, 18
Robinson's Case, 334	Topham v. Pannel, 373
Rogers v. Mascall, 128	Townsend's Case, 69, 92
Roskelly v. Rebecca Godolphin, 483	Traverse v. Meres, 32
Row v. Sir Thomas Clargis, 482	Turner v. Folgate, 73
Rumsey v. Rawson, 171	Twiford v. Bernard, 197
S.	V.
Sacheverel v. Frogate, 213	Vernon v. Alsop, 68
Sands's Case, 95	Vivian v. Willet, 207
Sanders v. Exton, 488	Usher v. Bushnell, 16
Salmon v. Smith, 175	W.
Saunders v. Edwards, 61	Walsal v. Allen, 395
St. Barbe v. Burton, 243	Ward v. Marsh, 115
Scot v. Knapton, 275	Ward v. Culpepper, 170
Seaman v. Barnes, 2	Watkinson v. Mergatren, 464
Sharrock v. Bouchier, 88	Wake's Case, 231
Sheldon v. Cliphsham, 449	Watson v. Baker, 175
Skinner v. Gunter and Lyon, 176	Welch v. Bell, 218
Smedley v. Heap, 169	Weeder v. Baldwin, 39
Smith v. Smith, 203	Wedyewood v. Bailly, 463
Smith v. Warner, 15	Windhurst v. Gibbes, 4
Smith's Case, 487	Dr. Widdrington's Case, 31, 68
Smith v. Batterton, 162	Wigson v. Garret, 239
Snow v. Cutler, 231	Wills v. Richel, 95
Southam v. Allen, 57	Williamson v. Bolton, 116
Southcot v. Rider, 379	Williams v. Fry, 236
Sir John Sparrow v. Draper, 74	Windfor v. Seywel, 17
Earl of Stamford v. Gordal, 381, 407	Wiseman v. Cotton, 59, 76
Lord Stafford's Case, 13	The Forum of Winchelsea's Case, 448
Stamp's Case, 367	Winfor v. Pinkney, 222
Sir Miles Stapleton's Case, 65	Winne's Case, 184
Steer's Case, 36	Willan v. Gill, 123
Stevens v. Bittridge, 408	Wilson v. Benson, 425
Stead v. Berrier, 250	Wince v. Loyd, 16, 55, 70, 96, 134
Stephens v. Hains, 35	Wheeler v. Honor, 41
Stiles v. Frispe, 185	Wheatly v. Thomas, 53
Stinton's Case, 179	Whitebread v. Brown, 75
Stone's Case, 67	Whaley v. Anderson, 121
Stonehouse v. Bodvil, 161	Whaley v. Tankred, 219
Syms's Case, 224	Woodward v. Benifshan, 3
Syms v. Syms, T.	Woodward v. Willgreffs, 386
Taverner's Case, 446	Y.
Taylor v. Brown, 170	Yard v. Ford, 195
Taylor v. Holmes, 233	Young v. Collet, 89
Sir Richard Temple's Case, 12	Young v. Cage, 223
Terry v. Hooper, 87	Z.
	Zinzan v. Talmage, 402

A TABLE of HEADS to which the CASES relate.

A.
A BATEMENT, Page 57, 118, 119, 131, 198, 395, 463.
Accord, 203, 450.
Account, 57.
Actions, 232.
Adjournment, 115, 116.
Administration, 93, 224, 483, 484, 496, 497, 498.
Admiralty, 3, 473.
Amendment, 38, 39, 42, 51, 53, 64, 160, 223, 230.
Amercement, 195, 202.
Ancient Demesne, 249.
Apprentice, 65, 176, 191.
Arbitrement, 53, 152, 169, 187, 205.
Assignment, 303, 304, 389, 390, 399, 460, 461.
Assumpsit, 8, 13, 32, 42, 67, 77, 86, 123, 127, 153, 203, 211, 233, 243, 260, 302, 303, 370, 372, 400, 401, 449.
Attachment, 35, 152, 171, 186, 190, 193.
Attainder, 53.
Attorney, 18, 59, 69, 245.
Attornment, 18, 90, 487.
Audita Querela, 19, 89.
Aulnage, 312.
Avowry, 21, 64, 170, 204, 250, 253, 257, 258, 337.
Award, 35, 94, 169, 187, 205, 415.
B.
Bail, 74, 100, 387, 474, 475.
Bankrupts, 6, 7, 337, 375, 376, 479, 480, 481.
Bar, 472, 449.
Bargain and Sale, 201.
Baron and Feme, 6.
Bill of Exceptions, 404, 405, 486.
By-law, 288, 324.
C.
Capias, 129, 130, 375.
Cafe, 5, 15, 23, 24, 52, 53, 61, 68, 71, 73, 87, 135, 176, 180, 187, 194, 195, 200, 201, 220, 226, 245, 259, 260, 327, 401, 418, 432, 463.
Certiorari, Page 74, 206, 448, 449.
Challenge, 473, 474, 484, 485, 486.
Charge, 58.
Chimin, 215, 250.
Church-Wardens, 439.
Coin, 185.
Commissioners of Charitable Uses, 209, 249.
Common, 171, 392.
Common Recovery, 70, 71, 96, 236, 278, 302, 315, 323, 349.
Condition, 25, 61, 68, 175, 190, 232, 236, 250, 373, 413, 414, 420, 464.
Conspiracy, 176, 180, 417.
Contempt, 186.
Copyhold, 18, 42, 402, 403, 404.
Corporation, 152, 188, 435, 439.
Costs, 38, 154, 135, 227, 487, 488.

Covenant, 25, 26, 27, 60, 65, 80, 160, 183, 190, 191, 222, 257, 303, 371, 459, 460, 461, 464.
Court, 3, 63, 68, 75, 78, 154, 367, 475.
Custom, 4, 25, 58, 59, 76, 116, 192, 204, 232.

D.
Damages, 15, 77, 124, 200, 387, 388.
Deer-stealing, 458.
Death, 131.
Debt, 6, 11, 12, 14, 18, 67, 68, 100, 124, 162, 183, 220, 222, 244, 389, 390, 391, 392, 394, 399, 416, 418, 419, 466.
Demurrer, 94, 98, 389, 390.
Deodand, 97, 208.
Departure, 22, 20, 84, 94.
Devise, 25, 28, 29, 30, 35, 40, 82, 83, 97, 162, 163, 164, 235, 236, 237, 240, 249, 330, 331, 333, 334, 335, 408, 409, 425, 426, 427, 428, 452, 453, 470.
Discontinuance, 36, 37, 38, 64, 204, 344, 389.
Disseisin, 371, 414.
Distress, 204, 209, 218.
Distribution, 496.
Dutchy, Page 90, 91, 206.
Duties, 368.

E.
Ejectment, 81, 395, 463.
Error, 5, 16, 20, 21, 55, 59, 70, 75, 93, 96, 115, 134, 172, 174, 189, 195, 202, 217, 218, 223, 231, 233, 275, 366, 375, 386, 387, 388, 390, 395, 398, 404, 431, 433, 434, 459, 461, 462, 463.
Escape, 100.
Estate, 132, 135, 150, 165, 224, 228, 260, 286, 319, 338, 452.
Estoppel, 21, 456.
Estreperment, 172.
Evidence, 1, 32, 84, 170, 191, 335, 336, 366, 380, 405, 408, 472, 487.
Exchequer, 17, 336.
Excommunication, 225.
Execution, 26, 58, 73.
Executor, 57, 71, 72, 95, 123, 198, 210, 211, 224, 230, 231, 415, 416, 470, 471, 483.
Extinguishment, 192.
Extortion, 216.

F.
False Imprisonment, 161, 205, 421, 422, 467, 468.
Felony, 275.
Fences, 487.
Fines and Forfeitures, 68, 84, 98, 138, 216, 231, 376, 377, 386, 418, 474.
Fines of Lands, 151, 219, 359, 461, 462.
Forcible Entry, 84, 85.
Forgery, 81.

G.
Game, 378.
Gavelkind, 59, 60, 76, 77.
Grant, 27, 88, 150, 151, 187, 241, 487.
Grant

- Grant le Roy, 90, 113, 114, 137, 241, 242, 362, 397.
H.
Heir, 207, 213.
Homine Replegiando, 474, 475.
Hue and Cry, 221.
Hundred, 360.
I.
Imprisonment, 421.
Indictment, 67, 186, 196, 212, 215, 373, 374, 375, 377, 378, 379, 385, 433, 434.
Infant, 118.
Information, 34, 35, 185, 191, 192, 193, 196, 201, 202, 205, 214, 216, 219, 231, 384, 417, 473, 474.
Inquiry, 124, 170.
Jointenants, 26, 27, 153, 187, 413, 414.
Issue, 458.
Judgment, 19, 118, 119, 200, 395.
Jurors, 84, 98, 113, 114, 138, 380.
Jurisdiction, 75.
Justices of Peace, 386, 433, 476, 477.
L.
Lease, 132, 133, 134, 165, 166, 167, 222, 418, 419.
Leet, Page 160, 204, 250, 337.
Ley Gager, 386.
Lien, 430.
London, 4, 116, 324, 328, 446, 447.
Limitation of actions, 61.
M.
Mandamus, 12, 31, 56, 57, 68, 69, 92, 94, 101, 102, 103, 134, 152, 153, 188, 211, 214, 235, 236, 365, 366, 431, 432, 439, 440, 446, 447.
Murder, 212.
N.
Non-claim, 219.
Nonfuit, 38, 73.
Nuisance, 74, 195.
O.
Oath, 212, 374, 440, 444, 445.
Obligation, 14, 15, 22, 61, 68, 175, 197, 220, 222, 226, 227, 232, 371, 373, 421, 430, 484.
Office, 53, 137.
Officer, 193, 211.
Ordinary, 91.
Outlawry, 17, 152, 462.
P.
Pardon, 13, 370, 477.
Parliament, 1, 54, 55, 120, 383, 384.
Patent, 155, 156, 177, 178, 179.
Peace, 196.
Perjury, 34, 35, 74, 81, 170, 202.
Pleading, 8, 9, 10, 50, 65, 94, 98, 137, 138, 175, 182, 199, 203, 230, 231, 245, 249, 389, 390, 449.
Poor, 476.
Power, 239, 247, 248, 295, 301.
Presentment, 160, 232, 233, 327.
Priest, 377.
Privilege, 12, 34, 81, 100, 101, 113, 114, 152, 179, 180.
Procedendo, 81.
Process, 128, 250, 251, 375.
Prohibition, 3, 4, 78, 88, 91, 92, 95, 123, 170, 189, 191, 219, 221, 227, 246, 278, 360, 387, 388, 425, 464, 465, 488, 489, 496.
Q.
Qui tam, 394.
R.
Record, 69.
Recusancy, 391, 465.
Release, 187, 366, 393, 399, 413, 414.
Remainder, 126, 127, 140, 150, 151, 236, 413.
Rent, 18, 137, 138, 158, 159, 162, 175, 194, 389, 390, 418, 419.
Repleader, 50, 379.
Replevin, 33, 34, 200, 251, 254, 255, 256.
Rescous, 161.
Reservation, 207, 213, 222.
Restitution, 74, 84, 85.
Return, 171.
Revocation, 69, 295.
Riot, 386.
S.
Scandal, 201.
Scire Facias, 50, 154, 177.
Sheriff, 113, 114, 161, 206, 362.
Sheriff's bond, 61.
Statutes in general, 54, 55, 191, 192, 209, 322, 355.
Survivor, 153.
Y.
Tail, 132, 133, 273, 274, 288, 317, 344, 358, 359.
Tenants in Common, 15, 80, 249, 371.
Tenant at Will, 224.
Tithes, 14, 95, 225, 277, 278.
Trade, 385.
Traverse, 173, 182, 199, 406, 407.
Treason, 120, 121, 122, 234, 346, 348, 367, 407, 408.
Trespass, 15, 16, 73, 185, 228, 259, 260, 305, 328, 328, 337, 395, 396, 414, 472, 487, 488.
Trial, 79, 85, 86, 173, 174, 181, 367, 372, 379, 392, 430, 458.
Trove, 2, 336, 463, 472, 473.
V.
Variance, 202, 398.
Venire Facias, 67, 79, 187, 387, 388, 417, 418.
Venue, 33.
Verdict, 193, 205, 337, 487.
Visne, 66, 85.
Uses, 43, 44, 45, &c. 49, 228, 229, 230, 248, 249, 278, 302, 315.
Ufury, 191, 196, 197.
W.
Wales, 206.
Ways, 186, 384.
Will, 334.
Witness, 1, 369, 379.
Words, 4, 12, 17, 23, 33, 35, 51, 62, 75, 81, 86, 115, 169, 184, 196, 207, 231, 395, 482.
Writs, 206.

Term. Mich. 12 Car. 2. B. R.

The Justices being

Sir Robert Foster,
Sir Thomas Mallet,
Sir Thomas Twisden,
Sir Wadham Wyndham, } Justices.

Mary Griggs's Case.

MARY GRIGGS was indicted upon the statute of ^{Witness.} 1 Jac. 1. cap. 11. for that she the 28th of February ^{2 Roll. Ab. 686.} 1653, was married to one Nicholas Coats, and that she afterwards, viz. the 10th of October, 1659, the first husband being then alive, married Edward Cage, &c. Upon not guilty pleaded, the first husband was produced at the trial as a witness to prove the first marriage; but the court totally refused to admit of his testimony, and said, That a wife could not be admitted to give evidence against her husband, nor the husband against his wife in any case, excepting treason, because it might occasion implacable dissention, according to 1 Inst. 6. b. And they denied the lord Audley's case in Hutton 116. to be law; so the prosecutor having no other considerable witness, the jury brought in the prisoner not guilty.

Bateman and Lawrence, Sheriff of Middlesex,
versus Swift.

DEBT upon the statute of Eliz. for poundage, for ^{Parliament.} executing a writ of execution. Upon Nil debet, ^{Show. 363.} pleaded, and a verdict for the Plaintiff, Sparks moved in ^{Salk. 331.} B arrest

Term. Hill. 12 Car. 2. B. R.

* P. 2.

* arrest of judgment, that the statute is mis-recited, for the plaintiffs in their declaration say, that the parliament was held 28 *Eliz.* and the book at large says it was held the 29 of *Eliz.* but upon examination it appeared by the parliament roll that it was held the 28 of *Eliz.* and the printed book is false, therefore judgment was given for the plaintiff. *Vide* 1 *Anderson* 291. pl. 303. a good case concerning the commencement of this parliament.

Seaman versus Barnes.

Trover.

1 *Danv. Abr.*

24. p. 5.

1 *Sid.* 263. 98.

3 *Keb.* 253.

507.

2 *Keb.* 765.

Stile 358.

1 *Vent.* 114,

196.

TROVER for two pair of pot-hooks, &c. and hangers, &c. after not guilty pleaded, and a verdict for the plaintiff, *Allen* moved in arrest of judgment, That hangers is a too incertain and equivocal word. *Baldwin* for plaintiff insisted upon it, That since pot-hooks preceded the word hangers, the court could not intend these were any other hangers than such upon which pot-hooks use to hang. And he cited a case of *Trover* for a billiard-table, port, sticks and balls, and adjudged good, because the port, sticks and balls should be intended things appurtenant to the table. But the court was of opinion that it was too incertain a word, for the word does not immediately follow the word pot-hooks, but there are divers other things mentioned between; therefore judgment was stayed.

* P. 3.

* Term Hill. 12 Car. 2. B. R.

Woodward versus Bonithan.

Court.

2 *Danv. Ab.*

262.

Lat. 11.

Moor 891.

pl. 1225.

4 *Inst.* 139,

140.

12 *Rep.* 103.

Hob. 107,

109.

A Master of a ship agreed with certain merchants concerning a voyage, and received orders from them to lay in provision of meat and drink, and also to provide mariners, &c. and after the voyage was finished the merchants refused to pay the master of the ship what they had agreed for; upon which refusal he libelled against them in the court of the Admiralty, &c. And now Serjeant *Wild* for the merchants moved for a prohibition, because they are sued upon a contract made upon land, and so the Admiralty has no jurisdiction. *Turner* against the prohibition, insisted upon

Term. Hill. 12 Car. 2. B. R.

upon it, That when a thing is in its nature maritime, as here the mariners wages, the Admiralty shall have the cognisance of it; and so it was agreed by all the justices, *Hil. 8. Car. 1. 1 Cr.* and of this opinion was *Mallet Justice*: but *Foster* Chief Justice and *Twissden* Justice held a prohibition would well lie, for the statute of *R. 2. 15. cap. 3.* was made at the great complaint of the Commons, and should therefore be construed most beneficially for the good of the subject; and when the ordinances and orders in the time of the late troubles were made, the constant and generally received opinion was, That for mariners wages, &c. the parties could not sue in the Admiralty, and for that reason pretended orders were made on *12 April 1648. cap. 11.* and another *23 April 1649, cap. 21.* to enable the Admiralty to hold plea of such things: and as to that case of *8 Car. 1.* they said, That that had not only been denied by several other judges as well as by themselves at this time, but had been renounced even by several of those judges who are said to have subscribed to it, for which reason a prohibition was granted. But all the judges agreed, that the granting of prohibitions is not a * discretionary act of the * P. 4. court, but are grantable *ex debito justitiæ*, and they denied my lord *Hobart's* opinion in his Reports 67. which *Roll* Chief Justice they said had frequently done before.

Reynolds *versus* Burton.

ERROR upon a judgment given in *C. B.* in an action upon the case for words: the plaintiff declared, That the defendant being seised of certain land, &c. said of the plaintiff, *Burton* had forged a deed to cheat me of my land, and he gave *A. B.* 40*s.* for ingrossing it. Resolved the words are actionable, and judgment was affirmed.

Words.
1 Roll. Ab.
65. p. 1.
1 D. Abr. 149.
p. 3.

Windhurst *versus* Gibbes.

COVENANT. The plaintiff declared upon a custom Custom.
in London, That every freeman may take an appren-
tice, and that infants may bind themselves to serve, &c.
After a verdict for the plaintiff, *Jones* moved in arrest of
judgment, that this custom is only alledged *in fieri*, and
not *in facto*, and consequently naught; for prescription
consists in the reiteration of acts, which this custom, as
B 2 here

Term. Hill. 12 Car. 2. B. R.

here set out, has not to support it; and he cited the case of 22 E. 4. 8. a custom that every man may turn his plow upon the next land adjoining, if it is not sown with corn; adjudged naught for not adding the usage. So *Rafch*. 37 *Eliz.* *Bishop's* case, a custom found within a manor, That every tenant of the said manor *potuit & potuisset sursum red- dare, &c.* and adjudged naught. So 21 *Jac.* *Sir William Hatton's* case, *Licet & licuit* for the lord to assess a pain for the breach of a by-law, adjudged void. And the pleading of gavelkind lands, which are *partita* as well as *partibilia*, and of copy-hold lands *dimissa* as well as *dimissibilia*, seems to demonstrate that the law is so. But the court was of the contrary opinion, and compared it to case of 21 E. 4. 28. and the *Old Book of Entries* 141. A custom, that every citizen and freeman might devise in *Mortmain*, and allowed good; and to this * opinion the judges inclined in the *King and Bagshaw's* case, 1 Cr. 347. so the plaintiff had his judgment.

* P. 5.

Dethick versus Bradbourne.

Error.
3 Danv. Abr.
242. p. 4.
2 Sid. 110,
117.

THE plaintiff had a judgment given for him in B. R. upon which the defendant brought a writ of error returnable in parliament, and the transcript of the record was certified, and errors were assigned, and the parliament dissolved before they were determined. Now *Jones* moved in B. R. for execution upon this judgment, and cited 1 H. 7. Pl. 5. page 20. *Flourdew's* case, and 2 Cro. 342. *Heydon versus Godsalve*, That a writ of error in parliament is determined by the dissolution of the parliament; the court after grand debate how it should appear to them that the errors are indetermined above, and that the judgment is not there reversed, at another day granted execution, and the reason they gave was, because the record it self was never out of this court, but only the transcript carried up by the Chief Justice, and there left; and when a judgment of this court is reversed in parliament, the transcript is returned hither, and this record made according to the transcript so returned. *Quod nota.*

Newce

Term. Hill. 12 Car. 2. B. R.

Newce *versus* Parker.

Intr. Mich. 12 Car. 2. Rot. 672.

ERROR out of C. B. upon a judgment there given Error.
in an action upon the case upon a wager, whether the
eldest son of a puisne knight bachelor, or the grandchild of
an elder knight bachelor should have the precedence by the
judgment of a herald; and the herald gave precedence to
the grandchild of the elder knight, and accordingly judg-
ment was given in C. B. and that judgment they were here
affirming, but the writ of error abated for false direction and
misrecital.

* Payne *versus* Minshal.

* P. 6.

DEBT for 15*l.* for rent. Upon demurrer to the de- Baron and
claration, the case was such, The plaintiff demises Feme.
by indenture, to Dame *Ashfield* a widow, a house in St. 1 Danv. Abr.
Giles's in the *Fields*, rendering 30*l.* a year rent; the de- 718. G. p. 1.
fendant marries her, and the rent is behind during the co- 1 Lev. 25.
verture; the wife dies, and the plaintiff brings this action 1 Keb. 20, 22.
upon the indenture against the husband for this rent; and
it seems the action well lies according to 10 H. 6. 11. a.
But it was adjourned; and afterwards it was adjudged for
the plaintiff.

Boylestone versus Radcliffe, Debt on Obligation.

Intr. Hill. 1657. Rot. 243.

THE plaintiff declares upon the statute of bankrupts, Bankrupt.
and on the pleadings the case was, That the defen- 1 Danv. Abr.
dant was indebted to one *Studder* and the plaintiff in a joint 691. p. 5.
obligation; *Studder* becomes a bankrupt, and this debt is 1 Lev. 17.
assigned to the plaintiff by the commissioners, to the use of 1 Keb. 167.
the creditors. *Finch* Solicitor General for the plaintiff; this
is a good assignment; and in this case we shall inquire, *First*,
What interest the obligees have? *Secondly*, What power
the commissioners have? *Thirdly*, If the commissioners
here have executed their power? *As to the first*, The obli-
gation cannot properly be the debt of them both, because

* P. 7.

an interest cannot be both joint and several, as *Slingby's* case, in *Coke's 5 Rep. 19. a.* and therefore they are both possessed *per my & per tout*; and then one of them being a bankrupt, the commissioners have power to assign the whole debt due to the bankrupt, and for necessity, because the statute of 1 Jac. says, That the assignee shall have the same remedy as the bankrupt. *Objection.* The debt is not the debt of the bankrupt only, but the debt of another also. *Answer.* It is also the debt of the bankrupt: if the husband be jointly seised in the right of his wife, and is * attainted and dies, the wife dies, the issue is barred, *Co. 8. Rep. 72. a. Greenley's case.* And by the frank-tenement of the wife, that is intended, that she hath jointly with her husband, by the statute of 32 H. 8. cap. 28. So when the husband loseth by default land which was the right of his wife, *jus uxoris* is that which she had jointly with her husband within *Westm. 2. cap. 3.* there, and this debt is in some sort belonging to the estate of *Studder*, for he may discharge it. Secondly, Assignment ought to be favoured, and therefore *Mich. 23. Car. Baker* against *Edmonds, Styles's Rep. 62.* An assignee brings an *Indebitatus Assumpsit* for 42l. upon an assignment of a debt due by contract of 43l. and upon *Non Assumpsit*, and a special verdict, resolved for the plaintiff; for although in strictness of law it is not good, yet in favour of *Creditors* it was held good. Thirdly, Whatsoever a bankrupt may forfeit, that may be assigned, and there he might have forfeited the whole obligation: and there is a difference betwixt a personal chattel in action and in possession; for of a joint personal chattel in action the king shall have all; but of a joint chattel personal in possession the king shall have only the moiety. 8 E. 4. 4. a. *Plowden 259. a. Co. 3. Inst. 35.* *Object.* Perhaps the other obligee hath released. *Resp.* That is not found in the verdict, and it may be as well surmised that it was in trust for the bankrupt. *Wyndham,* If there be two obligees, the one cannot release to the other, because a thing in action, and the statute shall not go by the rule of what thing the bankrupt may do, for he cannot assign a thing in action. *Twisden,* The case of the forfeiture of *felo de se*, of a joint debt is by prerogative, but he cannot assign the whole, and if he may, then the other may release it. Secondly, The statute saith, That the assignee shall have the same action. Here the bankrupt cannot have an action without the other. *Foster,* The question is, If the commissioners have power to take away the power of the other obligee to release the debt, and if the assignee dies, this survives to the other obligee;

Term. Hill. 12 Car. 2. B. R.

obligee; when the common law and statute-law concur, the common law shall be preferred. *Et adjournatur.*

* Jermy against Sir Arthur Jenny, *Assumpsit. Suff.* * P. 8.

THE plaintiff declares, That whereas the defendant Assumpsit.
the 8th of June 1655, at *Layston*, in consideration that the plaintiff at the special instance and request of the defendant would from thenceforth admit, entertain and board the defendant and his retinue in the house and family of the plaintiff, and would find, provide and allow to and for the defendant and his retinue, meat, drink and lodging, and horse-meat for his horses whensoever, and so often as should please the said defendant to repair and come to the dwelling-house to the plaintiff, did assume and promise to pay to plaintiff so much money for the same, as he should reasonably deserve, upon request. The plaintiff avers, That afterwards, (*viz.*) the aforesaid 8th day of June, and divers other days and times afterwards, he did admit, entertain and board the defendant and his retinue into the house and family of the plaintiff, and did find, provide and allow the defendant and his retinue, meat, drink and lodging, and horse-meat for his horses several times, and whensoever, and so often as it pleased the defendant after the same 8th of June, to repair and come to the dwelling-house of the plaintiff, and that he doth deserve 33*l.* 12*s.* and so brings his action. The defendant demurs upon this declaration, and shews for cause, 1. That the plaintiff doth not shew the time of notice when the defendant came to his house. 2. He doth not shew that the defendant after the 8th of June came to the house of the plaintiff. 3. Because the count is so defective, insufficient, incertain, and wants form, &c. *Scroggs* for the defendant. The declaration is incertain, because it doth not appear what days the defendant came to the house of the plaintiff, or that the plaintiff found him meat, drink, horse-meat, &c. and therefore on another action brought this action cannot be pleaded in bar; for he ought to have said, that divers days between the said 8th of June and the exhibition of the bill he entertained, &c. *Raymond* for the plaintiff. The count is certain enough, for as to the shewing that he entertained him from such a day * till such a day, perhaps the truth of * P. 9.
the fact was not so; and then if he had declared so, and the defendant had taken issue upon it, the issue would have been

Term. Hill. 12 Car. 2. B. R.

been found against the plaintiff, 2. If it had been divers times betwixt the 8th of June and such a day, this had been as uncertain as it is here, for the number of days would not appear, more than here, so that the jury may be ascertained what damages to give. 3. It is shewn that all was after the promise, and that nothing incurred after the bill; for the bringing of the bill shews that he hath not paid; and it seems that it cannot be better; for if he ought to have shewn all the days, or the time in particular, this would have made the declaration too prolix, and to no purpose, for upon the evidence it will appear what the plaintiff hath deserved; and upon this reason it was here adjudged in a case of the same nature, *Mich. 1654. B. R. Pratt against Banks*, error of judgment in the common bench, where the plaintiff brought an action upon the case upon a special promise, and the count was such, That whereas he was an attorney of the common bench, the defendant promised, that if he would prosecute a suit for him in the said court betwixt him and *A. B.* that he would give to him 3*s.* 4*d.* every term; and also if he would solicit another suit for him in chancery, and disburse the money that should be due to the officers and counsel, &c. that he would repay him, and give to him so much for his salary; the plaintiff avers that he did prosecute the said suit in the *C. B.* and solicited for him in Chancery, and paid divers sums of money to several officers and counsel amounting to so much, and that the defendant had not paid him, and judgment was for the plaintiff in *C. B.* and the defendant brought a writ of error, and assigned for error that the plaintiff did not set forth to whom the fees and money was paid, so that if the officers will sue the defendant again for the same money, he cannot plead this action in bar. But resolved, that it doth not behove him to alledge the particulars, for there is a difference where the action is grounded upon the duty, as in debt upon the contract, as *Gardner and Beltingham's case, Hob. Rep. 5.* And this is for conciseness of pleading, as in an action upon the statute of sending knights to parliament, the election shall be said *per majorem numerum. Plow. Com. Bulkeley's Case.* 2. The entertainment is at the request of the defendant, and therefore he best knows what time he was entertained; and * upon this reason it is adjudged, *Hill. 15 Car. B. R. Canwey against Aldre, Cro. Car. 573.* In an *Assumpsit* the plaintiff declares, That where he at the request of the defendant amended such a boat, and divers other boats of the defendant, he assumed to pay to him for his labour and charges
tantum

a H. 7. 15.
Pl. 22.

When the Mat-
ters to be
pleaded tend
to Infiniteness
and Multipli-
city, whereby
the Rolls shall
be incumbered
in the length
thereof, the
Law allows of
a General
Pleading.
Cro. Eliz. 749.
Mints versus
Bethil.
3 Bull. 31.
Crype versus
Bainton. Vide
Sid. 18.

* P. 10.

Term. Pasch. 13 Car. 2. B. R.

tantum quantum, and avers that he mended one and divers other boats, and that he deserved so much; and this objection was there made, but adjudged that it is good enough, by *Jones*, *Berkeley* and *Croke*; and the reason is, because the defendant (at whose request the said boats were mended) might well take consuance what boats they desired to have amended; and this case was well scanned, for that Justice *Berkeley* doubted of it at first, and there were precedents searched, and the Secondary there said, that divers precedents were in the case, and one was cited by *Croke* himself. *Assumpsit* was brought by a taylor, and he declared, that where he had made a gown, and divers other suits of apparel at the request of the defendant, he promised to pay him *tantum quantum*, and in *Cro. James* 370. in *Shepherd and Edwards's* case, in *Assumpsit* for curing a fistula, the plaintiff avers, that he such a day, and divers other days and times betwixt such a day and such day, caused to be applied medicines, and that he deserved so much; and judgment for the plaintiff; *Noy Rep.* 16. *Taylor and Charey*, *Assumpsit* to pay 4*l.* at *Lady-day*, *circiter illud tempus*, and avers, that he paid it not within forty days after; and adjudged for the plaintiff, because it appears that it was not paid when the suit was commenced. 3. The entertainment is according to the agreement, which is so often as the defendant pleased to come, &c. which cannot be set forth without great prolixity and hazard; and upon debate judgment was given for the plaintiff at another day.

* Term. Pasch. 13 Car. 2. B. R.

* P. II.

Robins against Cox and Warwick.

THE case was, *Kenne* seised of land in fee demises to the defendants for twenty-one years, rendering rent during the term, and then grants the rent only (without the reversion) to the plaintiff and his assigns during the term, and the defendants attorn; and for rent behind the plaintiff brings debt, and shews this whole matter in his count; and the defendants plead *Nil debent*, and found for the plaintiff. And *Powis* moved in arrest of judgment, because

Debt. v
2 Danv. Abr.
494. p. 16.
1 Lev. 22.
1 Keb. 1, 42,
71, 153, 250.

Term. Pasch. 13 Car. 2. B. R.

Contra H. 24.
Eliz. Cro. 3.
Rep. *Tanfield's*
Case.

because debt, as this case is, lieth not, because there is no privity betwixt the defendants and the plaintiff, and of a rent-seck there is not any remedy without seisin. *Baldwin* for the plaintiff. 1. Rent-service may come to be rent-seck, *Lit. seck.* 225. and here by the attornment there is *quasi* a new contract between the plaintiffs and the defendants. *Wyndham* Justice for the plaintiff, *L. 5. E. 4. 42.* Debt lies for an annuity granted for years; and *45 E. 3. 8.* privity of contract may be transferred; and debt lies upon a lease of a fair, and therefore a bishop may grant a fair for years, but not for life, because debt lies. 2. The law favours remedies. *Twisden* of the same opinion, because the rent was originally subject to an action of debt, and therefore, although it is now in another hand, yet the contract remains, as distress for rent, which is overplus of common right; and *Coke lib. 4. Ognet's case*, If an annuity be arrear, and the grantee dies, his executors shall have debt, because the person of the grantor was originally charged, *9 H. 7. 16.* A feignory in fee is granted for years, the grantee shall not have debt, because it is out of a fee, but after the term expired he shall have debt, *19 H. 6. 42. per Ascough*, and *44 El. Bendlows* against *Philips*, and *Cro. Eliz. 895.* It was adjudged that grantee of a rent-seck shall have debt, because the law favours remedies.

* P. 12.

Mallet Justice *contra*, because no privity is betwixt the parties; and of the same opinion was *Foster* Chief Justice; * and therefore the court being divided no judgment was given; *mes vide Cro. Eliz. 637 & 651. Ards versus Watkins*, where it is adjudged that an action of debt lies.

Mandamus.
1 Sid. 40.
1 Keb. 5.

A *Mandamus* was prayed for one *Stamp* to restore him to be a steward of a court-leet and court-baron of the manors of *Stepney* and *Hackney*, of which he was displaced in the troublesome times for his affection to the king, and one *Northey* put in his place; and *Tork* who moved for it, insisted that such writ well lies, because it is an office of administration of justice; and it is more reasonable than for an usher of a grammar-school, which was granted in the year 1655. in *Craford's case*, and for an alderman, *2 Bulst. 122.* in *Shuttleworth's case*, for a common council-man, *Stiles Rep. 32.* *Estwick's case*, for a town-clerk and constable, *Noy 78. Poph. 167.* for a burgess, *Cro. Jac. 506. Clark's case.* And the court inclined that the writ lay to restore one to the stewardship of a court-leet, but not to a court-baron; but it was adjourned, and precedents directed to be searched.

Sir

Term. Pasch. 13 Car. 2. B. R.

Sir Richard Temple being chose burgefs for *Buckingham*, Privilege. and having a trial at the bar to be had on *Tuesday* before 1 Sid. 42, the fitting of the parliament, moved by Serjeant *Maynard* 192. to have his privilege allowed him, but his motion was de- 1 Keb. 3, 13, 16, 727. nied in regard the parliament were not fitting, nor to fit till after the trial had, (*viz.*) the 8th of *May*, but the trial did not go on. *Vide Moor Rep.* 340. pl. 461. *Fitz-herbert's* case.

Rawlins versus Hill.

I Will indict Richard Rawlins at the next sessions, and he shall lose his estate, and it shall go hard with him for his life: but his estate he shall surely lose for marking my sheep. After verdict for the plaintiff, it was moved in arrest of judgment; and Jones being for the plaintiff said that these words tantamount to felony; but by Wyndham Justice, the latter words mitigate all, and therefore judgment was stayed until, &c. Words. 1 Keb. 6, 17.

* *Johnson versus Samworth.*

* P. 13.

THE plaintiff counts, that the defendant in consideration that the plaintiff would give to him 5 s. he would give to the plaintiff 40 s. if he ever played at a game called *Even and Odd* for money or wine, and avers that he gave to him 5 s. and that the defendant played at the said game such a day, *unde actio accrevit*. Upon *Non Assumpsit*, and verdict for the plaintiff, it was moved in arrest of judgment, that there was not any such play; but it was allowed, and the court approved of the consideration to restrain young men from gaming; and judgment was given for the plaintiff. Assumpsit. 1 Keb. 9.

Memorandum, *Thomas Howard* (brother to the earl of *Carlisle*) and his two servants, *Michael Naylor* and *John Mills*, were indicted for murder, for the killing one *Proby* servant of a horse-courser at *St. Giles* in the *Fields*, and found guilty of the murder, and attainted; and now on this 4th day of *April* they were brought to the bar to shew a pardon which they had obtained, and shew cause why they should not be executed; and they pleaded the pardon, which was read, and it (as I well observed) recited all the proceedings Pardon. 1 Sid. 41, 4. 1 Keb. 9, 19, 108.

Term. Pasch. 33 Car. 2. B. R.

ings upon the indictment, and then the king was informed that no evidence was given that there was any malice pre-pense in them in other manner than by construction and implication of law, and for that the king pardoned the killing and felony, &c. but no word of murder was in it but by description; and the court were troubled to hear such a suggestion in the patent, because they knew the contrary to be true, and therefore they said, that upon such a pardon a *Scire facias* might be brought seven years hence, and they might be hanged notwithstanding this pardon, and therefore they advised Mr. *Howard* to procure a better pardon; and *Wyndham* Justice said, That the suggestion of the pardon might have been grounded on the merits of the prisoners, &c. But upon this charter the prisoners have not produced any writ of allowance, and therefore the pardon was not allowed; but their execution respited till another day, at which day they produced a patent without any suggestion at all, and a writ of allowance, but the date was mistaken, and did not agree with the writ, and therefore execution was respited over.

* P. 14.

* *Godlington versus Lee.*

Debt.
Debt lies on a
judgment gi-
ven on the *Sci.*
fac. against the
bail. Inst. 236.
Upon the Re-
cognizance.
1 Roll. 600.
pl. 7, 8.

Vide un Presi-
dent, Trin. 8.
Jac. Rot. 805.
1 Brown. 65.
Booth *against*
Davenant.
Winch 61.
Sparrow *vers.*
Sowgate.
Hetley 129.

THE case was, The defendant became bail in this court for another, and judgment was given against the principal, and now the plaintiff brings debt upon this recognizance; and *Allen* moved for an imparlance, because debt lieth not in such case, because by this means the bail shall be ousted of his plea of no *copias* filed against the principal, and also abridged of his time of bringing the principal, which he hath until the second *Scire facias* returned, for now immediately he shall be liable to the debt; and although it was objected, that there had been precedents of such action, and *Bendloes* in the time of H. 8. makes mention of it, he said those precedents passed *sub silentio*, and therefore they are not to be regarded; and for these reasons the court granted an imparlance that such action lies not; *quod nota.*

Barnard

Term. Pasch. 13 Car. 2. B. R.

Barnard versus Ewens.

DEBT upon 2 E. 6. for tithes. The defendant pleads an agreement between the plaintiff and him for three years, and doth not alledge this to be by deed, and issue upon it, and found for the defendant; and *Pewis* moved for the plaintiff to have a repleader, because the issue is not good; but resolved by the whole court, although it is not such an agreement which may pass the right, yet it is a good agreement within the statute to bar the plaintiff in his action of debt; *Yelv. 94. Hawks versus Brothwick 131.* accordingly.

Tithes.
Contra Hob.
176.
Cro. Jac. 137.
Hawles versus Bayfield.
2 Danv. Abr.
621. p. 7.
1 Lev. 24.
1 Keb. 5, 21.

Glinister versus Audley.

DEBT upon an obligation; the defendant demands oyer of the condition, which was to perform covenants, one of which was, That the defendant covenanted that he was seised of an indefeasible estate in fee-simple, and the defendant pleads covenants performed; the plaintiff replies, That he was not seised of an indefeasible estate in fee-simple, and the defendant demurs generally, because he supposed that the plaintiff ought to have shewn of what estate the defendant was seised, in regard he had departed with all his writings * concerning the land in presumption of law, and therefore the plaintiff well knew the title; and it is not like to *Bradshaw's* case, because there the covenant was with the lessee for years, who had not the writings. But resolved the breach was well assigned according to the words of the covenant; and judgment was given for the plaintiff.

Debt.
1 Keb. 52.

* P. 15.

Graves versus Sawcer.

IN an action upon the case, the plaintiff declares that he was owner of a sixteenth part of a ship, and the defendant was owner of another sixteenth part of the same ship, and that the defendant fraudulently and deceitfully carried the said ship *ad loca transmarina*, and disposed of her to his own use, by which the plaintiff hath lost his said sixteenth part, to his damage. On not guilty pleaded, and verdict for

Case.
1 Lev. 29.
1 Keb. 38.

Term. Trin. 13 Car. 2. B. B.

for the plaintiff, It was moved in arrest of judgment, that this action doth not lie; for although it be found to be deceptive, yet this does not help it, if the action doth not lie on the subject matter; and here they are tenants in common of the ship; and *Littleton* saith, That between tenants in common there is no remedy; and there cannot be any fraud between tenants in common, because the law supposes a trust and confidence betwixt them; and upon these reasons judgment was given *quod querens nil capiat per Billam*. Vide *Noy* 14. *Crosse versus Abbot*, M. 11. H. 4. 13. a. pl. 29.

Smith *versus* Warner. Trespass.

Damages.
1 Keb. 49, 61.
Hern's Ent.
320.

TRESPASS for taking goods: the plaintiff counts *de una Satagine, Anglice* a frying-pan: And after verdict for the plaintiff, It was moved in arrest of judgment, because it ought to be *Sartagine*, for *Satago* signifies nothing; and adjudged for the plaintiff; for if *Satago* signify nothing, then no damages were given for it, and the difference was taken where the word signifies another thing, there it is ill, but where it is insignificant it doth not vitiate.

* P. 16.

* Term. Trin. 13 Car. 2. B. R.

Usher *versus* Bushnel.

Trespass.
If they were
taken in the
Warren or
Wood of the
Plaintiff, they
might be his
Pheasants.

Cro. Car. 553.
Child *versus*

TRESPASS *vi & armis quare Phasianos suos & Perdices suas cepit*; and not guilty found for the plaintiff; and moved in arrest of judgment, because they are *feræ naturæ*, and therefore there cannot be any property in them: But adjudged for the plaintiff, because after verdict they shall be presumed dead, and then a property may be in them.

Greenhill. 1 Sid. 39. 1 Keb. 53, 60.

Wynne

Wynne *versus* Lloyd.

ERROR to reverse a common recovery in *Anglesey*, Error. the errors assigned were in the writ of summons, and in the *dedimus potestatem*, and upon this a *Scire facias* issues against the demandant in the recovery, who pleads *In nullo est erratum*, and then upon suggestion that *Wynne* was concerned, a *Scire facias* issued to him, and he pleads that another had lands comprized in the said recovery, who is not named in the said writ of error, judgment of the writ, and on this plea the plaintiff demurred. *Allen* for the plaintiff; this plea is not good, because the process had been good without naming this party, for the ter-tenant only is to be there of necessity, *Dyer* 321. a. and he shall only plead the thing, for which judgment shall not be reversed, and not in abatement of the writ of error, 30 H. 6. 2. b. *per Fortescue*. 2dly. This plea is not to any purpose, for the court may proceed without the other ter-tenants. 3dly. Such plea is against the return of the sheriff expressly, for he hath returned the ter-tenants. 4thly. This plea is ill, because he pleads that *A.* is ter-tenant of divers, and doth not say what lands.

Postea 55, 70,
96, 134.
3 Danv. Abr.
49. p. 7.
1 Lev. 72,
130, 146.
1 Keb. 351,
388, 459,
717, 748,
809, 914.
1 Sid. 213.
Vid. Moor
524. pl. 693.
Clark *versus*
Hardwick.

Williams contra. These questions are inquirable; 1st. If a *Scire facias* be necessary against the ter-tenants in this case. 2. If every ter-tenant ought to be returned. 3. If another ter-tenant that is not returned may be suggested at the bar. * P. 17.

As to the First. A *Scire facias* in this case is necessary against the ter-tenants, because none gains or loses but they, *Dyer* 321. before; and all the precedents mention this, *Cro. Jac.* 392. *Harbert versus Binion*, 160. *Champernoon* against *Godolphin*, 41 Eliz. *Lee versus Holland*, and *Row* versus *Eoeley*, and *Owen* 157. *Carew versus Warren*, 21 E. 3. 56. *Bridgman* 70. *Holland versus Jackson*.

To the Second. A *Scire facias* being awarded generally, every one ought to be summoned.

Object. The party shall not be concluded, although he be not summoned.

Answ. He shall not be concluded if he come in due time; but the discretion of the court will support a common recovery, and here if this ter-tenant doth not come, he shall be concluded, for it is not like to *Dyer* 321.

Term. Trin. 13 Car. 2. B. R.

To the Third. It now appearing to the court that there is such a ter-tenant, a *Scire facias* ought to issue against him, *Fitz. Scire facias* 38. 21 E. 3. 56. and it was adjourned, *post*.

Nuttal *versus* Page.

Words.
1 Keb. 50, 56.

NUTTAL that was *Solomon Smith's* clerk is a knave, and rogue, and I will prove it, and he is in *Newgate*, and is to be hanged for counterfeiting the king's hand and seal; adjudged for the plaintiff.

Windser *versus* Seywell. *Ejectment*.

Outlawry.
1 Keb. 57,
74, 76.
1 Lev. 33.

ON a special verdict, the case was, *A.* outlawed in a personal action levies a fine, and the king seizeth the land in the hands of the conusee, and whether such seizure be good or not, was the question; and resolved, That if the seizure was before the fine levied, then the king may well retain against the conusee: but if the fine was levied before the seizure, the conusee may well take; and the book of 21 H. 7. f. 7. was denied, that the king cannot dispose of the land it self of a person outlawed, for the course of Exchequer is against that book. *Vide Stamf. Prerogat.* 57. and 24 Car. *Pickering's* case in the Exchequer. T. 9 H. 6. 21. a. pl. 15. *per Babington*, 1 Leon. 63. pl. 84. Cro. Eliz. 270. *Ognel's* case, H. 15 H. 7. 2. pl. 4.

* P. 18.

* Tippin and Grover.

Rent.
1 Keb. 62.

DEBT for rent brought by executors, the plaintiffs count, that their testator was seized for another's life of certain tithes, and demised them to the defendant for years, rendering rent, and for 400l. arrear they bring debt; and on demurrer on this declaration, *Jones* argued it is a rent, and that the executors shall not have this rent, because it appertains to the reversion, for it is a rent although not in point of remedy. Cro. Jac. 112 & 453.

Allen contra. Debt lies upon the contract, which goes to the executors. But he perceiving the opinion of the court to be against him, prayed a discontinuance, which was granted him.

Black

Term. Trin.—13 Car. 2. B. B.

Black *versus* Mole. *Replevin.*

A Copyholder makes a lease for years rendering rent, and then surrenders two parts of the reversion, and he to whole use the surrender was made distrains for the two parts of the rent, and mentions not any attornment of the tenant in his avowry, nor any notice; and upon this avowry the plaintiff demurs; and adjudged that attornment and notice are not necessary, because the surrender is a thing notorious of it self.

Attornment.
1 Danv. Abr.
614. p. 8.
1 Lev. 40.
1 Keb. 93.

Andrews *versus* Showell.

THE Case was, The defendant gave a warrant of attorney to one to confess judgment in debt to the plaintiff by *non sum informatus* at eight a clock in the morning, and at ten a clock before the judgment signed by the Secondary, the defendant dies, and now the executors of the defendant move to set aside this judgment; but resolved it was well obtained, it being for a good debt; *quod nota.*

Attorney.

* P. 19.

* Term. Mich. 13 Car. 2. B. R.

Sir Robert Foster, Chief Justice.

Sir Thomas Mallet,

Sir Thomas Twisden,

Sir Wadham Wyndham,

} Justices.

Memorandum, The last vacation Serjeant Glanvil, who was the King's first Serjeant, died.

Day versus Guilford. *Ejectment*.

Hill. 12 Car. 2. Rot. 952.

Audita Querela.

1 Danv. Abr.

630. p. 15.

633. p. 12.

1 Keb. 112.

341.

1 Sid. 54.

1 Lev. 41.

ON a special verdict the jury found Edward Guilford, father of the defendant, was seized of the lands in question for life, the remainder to the defendant in tail; the father enters into a recognizance in Chancery, to the lessor of the plaintiff, and dies, the lessor sues a *Scire facias* upon the same recognizance, the sheriff returns the defendant heir and ter-tenant, & *quod Scire fecit* the defendant, and he makes default and doth not plead; and judgment is given, that the conusee have execution, who leases to the plaintiff.

Wild Serjeant for the plaintiff, Here by the judgment upon default in the *Scire facias* the defendant is bound until he reverses it either by writ of error, or relieves himself by *Audita Querela*, F. N. B. 104. b. Kel. 25. a. Pasch. 1652. B. R. Barcock versus Thompson, Styles's Rep. 323. If judgment be given against the bail upon two *Nichils*, and no *capias* is returned against the principal, although the bail cannot reverse the judgment by error, yet he may have an *Audita Querela*, but not upon a *Scire feci* returned. Vide Mich. 1657. B. R. Kilburne versus Rack, *Ejectment*, B. R. Intr. Trin. 1656. Rot. 876.

* P. 20:

* Wyndham for the defendant, It seems this case differs from the cases put, because here execution is sued upon another estate than the conusor had; as if the sheriff return J. S. ter-tenant, who never had any thing in the said land

Term. Mich. 13 Car. 2. B. R.

land of the conusor, yet *J. S.* may maintain an *Ejectment*, Mich. 6. R. 2. Fitz. *Assise* 69. And here the conusor had only an estate for life, and not the estate of which the defendant was seized at the time of the action.

Twisden for the plaintiff, *Vigilantibus & non dormientibus jura subveniunt*, the defendant ought to have pleaded when he had warning, and now he shall not falsify his recovery, and there is a difference when the conusor is tenant in tail, and when for life; and now the defendant is estopped by the return of the sheriff; and this differs from the two *Nichils*.

Mallet for the defendant, *Res inter alios actæ nemini nocere debent*.

Foster for the plaintiff, Here is a wilful contempt in the defendant, for that he came not in on the *Scire feci*. It was adjourned, and after judgment was given for the plaintiff.

Mich. 13 Car. 2. B. R.

He is a base fellow, and I will question him ere long, for that he would have taken away the King's life. Verdict for the plaintiff. And *Jones* moved in arrest of judgment, but it seemed to the court that the words were actionable, because in case of the king the intent is punishable; but adjourned.

Urfula Austen versus John Mander.

Error of a Judgment in Oakhampton in Devon.

THE errors taken by *Alleyn* were, 1st, The *Venire fac.* Error. is, therefore it is commanded by the court that he make 1 Keb. 113. to come twelve, &c. by whom, &c. and who, &c. in a brief manner, as in the courts at *Westminster*, where it ought to be at large in all inferior jurisdictions. *Answ.* In the case of *Osborne* and *Gregory* of a judgment in *Excester*, this exception was moved and disallowed. 2^{dly}, He doth not say that process of *Distingas* is awarded by the court, but as before, &c. *Answ.* It is good because it refers to the matter before. 3^{dly}, The judgment is *quod recuperet*, and also 39 s. *pro missis & custagiis de incremento*, and doth * not say *circa festam suam*, and it may be that the increase * P. 21. was for sickness or battery, or some other collateral matter. *Answ.* The precedents are all so at *Westminster*, and it shall not be presumed for any other thing than for the said

Term. Mich. 13 Car. 2. B. R.

suit; and *Twisden* said, That the reason, for which nothing out of inferior courts shall be taken by intendment, is, because there they only enter short notes of their proceedings, and when they are to certify, the attornies here draw the records at large; and judgment was affirmed.

Palmer *versus* Stavick. *Replevin*.

Estoppel.
Pas. 1652. B. R.
Carter *versus*
Wicker, Rot.
448.
3 Danv. Abr.
273. p. 56.
1 Keb. 95,
113.
1 Sid. 44.
1 Lev. 43.

THE defendant made consufance for a rent-charge due *Anno Dom.* 1658. The plaintiff pleads, That the defendant upon another *Replevin* at another time, together with *A. B.* made consufance upon the said plaintiff for rent arrear in the year 1660, and demands judgment, if against the said avowry he shall make consufance for rent due before, and relied upon the said estoppel, and the defendant demurred. *Jones* for the plaintiff, It seems the defendant is estopped by the avowry as by an acquittance, and *a fortiori* because it is matter of record, and that an acquittance is a bar of arrearages, the books are plain, *Dyer* 271. *a.* 3 *Coke* 65. *b.* *Pennant's* case, 11 *H.* 4. 55. *a.* But the truth is *Fitz. Bar.* 79. is against me; but that case I deny, and also the case of the annuity. *Obj.* The avowry here is not betwixt the same parties. *Answ.* They are the same defendants, and the same parties in whose rights the distress is made; and if this shall not be the same action, there will be infinite veration.

Allen for the defendant, Here is not any estoppel, because not between the same parties, and in truth the duty remains, and the bailiff cannot conclude his master.

Wyndham is clear for the defendant; and the opinion of *Fitz. Bar.* by three Justices is good, because an annuity may be paid without acquittance.

Twisden of the same opinion.

Mallet for the plaintiff, because an avowry is a thing upon record, and more than an acquittance; but judgment was given for the defendant.

* P. 22.

* *Granger versus Hemborough. Debt.*

Departure.
1 Sid. 77.
1 Keb. 115,
178, 183,
230, 283.

DEBT upon an obligation of 50*l.* to perform covenants in an indenture, and one is, That the defendant pay 12*l.* a year for a messuage to him demised quarterly, at four feasts. The defendant pleads performance of all covenants. The plaintiff assigns for breach, that he did not pay 3*l.* one quarter's rent. The defendant rejoins, that

Term. Mich. 13 Car. 2. B. R.

that before the said 3^l. was due, the plaintiff entered upon him, and expelled him. The plaintiff demurs.

Baldwin for the plaintiff, The rejoinder is a departure, for he might have pleaded this matter in his bar, as *Dyer* 291. *Fitz Williams's* case. In a *Formedon* the tenant pleads a fine, the demandant replies, *quod partes finis nihil habuerunt*, but that such a one was seised; the tenant rejoins that the party that levied the fine was seised in use; and resolved a departure, for he alledges before a seisin at common law, and now would make this good by the statute.

Jones for the defendant, This rejoinder is a corroboration of the bar, and he ought not to have pleaded this thing at the first, because there are several covenants, and he could not know in which of them he would have assigned the breach; and there is a difference where the condition is to perform all covenants comprised, and where it is all covenants and payments, as *Chapman's* case is, *Cro. Car.* 76. there the defendant pleaded performance of all; the plaintiff assigned a breach in non-payment of the rent; the defendant cannot rejoin, that it was not demanded, because it is a departure.

Wyndham, It is a departure, and it is not like to the case of demand, because it is a discharge.

Twisden agreed with *Wyndham*, Where the defendant pleads a general plea, he shall not make this good after by a particular thing in the rejoinder; but it was adjourned, and after ruled to be a departure, and judgment given for the plaintiff. *Vide Cro. Eliz.* 828. *Specot* and *Sheers*, a case directly in point.

2 Danv. Ab.
101. p. 11.
Hutt. 91.
Moor 636.

* *Harris versus* ———

* P. 23.

THOU art a traitor and a rebel; the defendant justifies, that 28 Sept. 1659, the plaintiff was a soldier under one captain *Ceely*, against the king: plaintiff demurs, presuming the general pardon had restored him to his good fame, as *Hob.* 81. *Cuddington* against *Wilkins*; but adjudged for the defendant, because the plaintiff ought to have shewn that he was not one of the persons there excepted.

Words.
1st Keb. 115.

Nicholson

Term. Mich. 13 Car. 2. B. R.

Nicholson *versus* Sherman.

Case for a Legacy.

Case.

1 Danv. Abr.

207. p. 4.

1 Sid. 45.

1 Keb. 116.

THE plaintiff declares, that *James Glasseybrook* made his will, and devised to the plaintiff 100*l.* and that his executors should double the said 100*l.* And for the 200*l.* he brings this action, and avers the defendant hath assets beyond debts; and the defendant demurs.

Jones for the plaintiff. Here are two points. 1. If the doubling the 100*l.* be a devise, or that it shall be only at the discretion of the executors; and it seems clear that it is a devise, and the other part doth not oppose it. 2. If an action upon the case lies for a legacy; and held that it does. 1*st*, I will not insist whether there be any remedy for a legacy at common law. *Glanvil*, lib. 7. chap. 6, 7. 2*dly*, An action of the case lies against an executor upon a breach of trust, as it lies against a shepherd for not regarding his charge. And first, the law takes notice of legacies to collateral purposes, as a promise to forbear a legacy is a good consideration to ground an *Assumpsit*; and in an action against an executor in his own wrong, it is a good plea to say that he hath paid all in legacies; and an action upon the case lies for a *Tort*, as for not performing a contract, *Cro. Jac.* 544. *Healy versus Duntley*. Here is a breach of trust, because the executor takes upon him to perform the will of the plaintiff. *Object*. Legacies cannot be sued for here in *specie*, and it was never known before. *Answ.* The action of *Indebitatus Assumpsit* was a rare action before *Slade's case*.

1 Danv. Ab.
198. p. 6.

* P. 24.

* *Wyld contra*. An action doth not lie for a legacy, because it is a testamentary thing, and one of the principal, as appears by the writ of prohibition, *Register* 38. and the same argument that *Littleton* uses for the statute of *Merton* may be here used, that never such an action had been used; and the rule of the civil law is not current in *Westminster-Hall*, *Boni Judicis est ampliare jurisdictionem*; and true it is, the common law takes notice of a legacy; but so, as it is a testamentary thing, and as to the *Indebitatus Assumpsit* which was so rare, yet it was within the jurisdiction of the common law; and although of late time such actions have been used, yet this was left there should be a failure of justice when there was no ecclesiastical court; and so it was adjudged in *Harwood* and *Peytoe's case*, that an *Elegit* might be executed in the glebe land of a parson; but if it were to be adjudged now, it would not be so ruled as it was then.

Hard. 65.
Styl. 161, 168.

2*dly*,

Term. Mich. 13 Car. 2. B. R.

2dly, If it be a breach of trust, then it is a personal tort, & *moritur cum persona*, as an executor shall not be responsible for an escape suffered by the testator. *Dyer* 322. a.

Wyndham, The action doth not lie, for the consufance of a legacy doth not appertain to the common law, for that by our law a man cannot give any thing after his death, because *post mortem tunc tua non sunt*, and there is not any such duty at the common law as a legacy; and an action of the case doth not lie for every Tort, for it doth not lie for non-payment of rent, and a pension raised by the constitution of the ordinary is not suable here.

Twifden, It was adjudged here, that a legacy issuable out of land is suable here, and originally legacies were suable in the county court; and *Rastal Entries* 301. a. *Title Execut. in Action* 5. Debt is brought against an executor for a legacy, but a demurrer is on the count, and no judgment given; but that which moves me against this action is, that by this way an action upon the case will be brought for every thing suable in the ecclesiastical court.

Mallet and Foster for the defendant. And judgment was given for the defendant, *nisi*, &c.

* *Eden versus Chalkhall. Ejectment. Middlesex* * P. 25.
for Lands in Southmymms.

UPON evidence in a trial at bar, the case was, That ^{1 Keb. 40,}
Henry Crawley 6 Nov. 1645, conveys by indenture ^{117.}
to *Web* and *Taylor* in fee, and levies a fine accordingly without any consideration, and 13 March 1645, he covenants to stand seised to the use of himself for life, the remainder to his first son in tail, who is the lessor of the plaintiff and levies a fine accordingly; the 28 March 1653, *Henry Crawley* and his wife, with *Web* and *Taylor* join in a voluntary conveyance by fine to *William Godfrey* and his heirs; *Henry Crawley* having issue the lessor of the plaintiff dies; *William Godfrey* makes his will, and of this makes the lord *Windsor* and the lord *Castleton* his executors, and devises the lands to be sold by them; they the 19 March 1657, sell to *Skinner* and *Skinner* for 2000*l.* who convey to *Sir Thomas Bide* and his heirs. And it was resolved by the court, That although *Skinner* and *Skinner* paid a valuable consideration, yet the estate to *Godfrey* being voluntary, if the conveyance of 6 Nov. 1645, was forged, the plaintiff hath good title; but the jury found the first conveyance good, and found for the defendant.

Elizabeth

Term. Mich. 13 Car. 2. B. R.

Elizabeth Robinson against Margaret Amps.
Covenant.

Condition.
2 Danv. Abr.
44. p. 10.
79. p. 1.
1 Keb. 103,
118.
1 Sid. 48.

* P. 26.

THE plaintiff declares, That the defendant by indenture dated 1659, reciting, that there was a lease made to the defendant, and a recognizance acknowledged by *Humfry Robinson* to the defendant, bearing date with the said indenture, the defendant covenanted that if *Humfry Robinson* pay to the defendant such a sum 24 June 1660, &c. that then the said recognizance shall be void, and then the defendant, his executors and administrators, &c. at the costs of the plaintiff will regrant the said indenture, and redeliver the said recognizance to be cancelled and vacated, and the plaintiff assigns for breach, that 21 October 1659, the defendant prosecuted an extent upon this recognizance. The defendant pleads, that he did not * prosecute upon this recognizance, and issue upon it, and found for the plaintiff; and *Jones* moved in arrest of judgment, that here is only an implied breach, for the recognizance may be delivered up, and yet the recognizance be prosecuted.

Allen for the plaintiff. 1. Where a covenant terminates in it self, it is properly a covenant but a defeazance, *Plow.* 138. a. But here is an engagement to deliver up the said recognizance. 2. Here is a present breach, for when he extends, the plaintiff shall not be compelled to stay till a farther day, when the extent is a breach of the covenant, as 5 Co. 22. *Sir Anthony Maine's* case.

Wyndham. A covenant to do a present act is not properly a covenant; as to stand seised. And as to the second, the defendant hath disabled himself to deliver up the recognizance, as feoffee on condition takes wife, &c. and the breach here is well assigned.

Twisden to the same intent, and so the other judges; and judgment was given for the plaintiff, *nisi*, &c.

Edsar versus Smart.

Execution.
3 Danv. Abr.
311. p. 5.
334. p. 5.
1 Lev. 30.
1 Keb. 92,
131.

JUDGMENT in debt is had against two, and one dies, and the plaintiff brings a *Scire facias* against the survivor, and recites the death of the other, and prays execution against the survivor; the defendant pleads, that he which died had an heir, who is in full life, and demands judgment if execution, &c. plaintiff demurs. *Wynnington* for the plaintiff: It seems to me that the execution is well against

Term. Mich. 13 Car. 2. B. R.

against the survivor: And as to that, 1. We ought to inquire what the common law is. 2. What alteration the statute of *Westm. 2.* hath made. As to the first, at common law, If judgment had been given against two, and the one dies, the charge survives, Sir *William Herbert's* case. Hob. 25. To the second, The statute of *Westm. 2.* which gives the *Elegit*, doth not take away the privilege of the plaintiff, but that he may have execution at the common law if he will, for the words of the statute are, *fit in Electione*, and this statute was made only for the benefit of the plaintiff. *Obj.* And as to the 29 of assizes, *Longford's* case, I answer, the same case is reported 29 *E. 3.* 39. and there by *Thorpe* the lands are equally liable, and by that it may be easily collected, they intended execution only upon the lands, and not a personal charge; but here may be a personal charge, and * that is the difference; for when the charge is upon the lands then it doth not survive, but when it is personal it shall; and for authorities direct in the point, *vide 3 E. 3.* 11. pl. 37. 1 *E. 3.* 13. p. 41.

Wyndham Justice. The books of 1 and 3 *E. 3.* are direct Yelv. 209. cont. in the point, and the reason why this execution shall be against the survivor, is, because the plaintiff may take a *Fieri facias* if he will, and perhaps he will not charge the land.

Twifden of the same opinion; and if upon this *Scire fac.* the plaintiff takes an *Elegit*, the defendant, may have an *Audita Querela*; or, 2dly, He may suggest this matter upon the return of the *Elegit* and have a *Superfedeas*, *F. N. B.* 166. 44 *E. 3.* 10. 4 *E. 4.* 39. 7 *H. 4.* 30. and judgment was given for the plaintiff, *nisi, &c. Vide Pasc. 1 H. 5. 5. a. pl. 6.*

Richard Capenhurst *versus* Capenhurst.

DEBT upon an obligation to perform covenants; the case was such, *A.* possessed of a term for years grants so much of the term, that shall be unexpired at the time of his death; the grantee assigns, and covenants that the assignee shall enjoy against all persons, and the plaintiff assigns a breach, and issue upon it, and verdict for the plaintiff; and *Bigland* moved in arrest of judgment, that the action did not lie, because the original grant being void for the uncertainty, as in the rector of *Chedington's* case, the covenants are void also, because the bond depends on the covenants, and the covenants depend on the lease; and he cited *Yelv. fol. 18. Soprani and Skurro.* Covenant. 2 Danv. Abr. 228. p. 5. 3 Danv. Abr. 209. p. 1. 1 Lev. 45. 1 Keb. 130, 164, 183.

Jones

Term. Mich. 13 Car. 2. B. R.

Jones for the plaintiff. The term is not well assigned, but here is a covenant which stands distinct by it self, and if there be not any covenant, then the obligation is single.

Wyndham Justice. If the deed is void, no covenant in it shall bind. And judgment was stayed; but it was after adjudged for the defendant. *Vide Owen Rep.* 136. *Waller* against the dean and chapter of *Norwich*, that the covenant shall bind, though the deed be void.

* P. 28.

* *Plunket versus Holmes.*

Devise.
2 Danv. Ab.
519. p. 15.
Eq. Ab. 188.
p. 12.
1 Lev. 11.
1 Sid. 47.
1 Keb. 29,
119.

THE wife having two sons by divers husbands (which were dead) and being seised of the lands in question, in fee, devised them to *Thomas* her son for the term of his natural life, and if he die *without issue* of his body *living* at the time of *his death*, then to *Leonard* another of her sons, and his heirs for ever; but if *Thomas* have *issue living* at the time of *his death*, then the fee shall remain to the *right heirs of Thomas for ever*; the woman died, *Thomas* entered and suffered a common recovery, and dies without issue, the recoveror made a lease to the defendant, *Leonard* entered upon him, and made a lease to the plaintiff; *Et sic, &c.*

Allen for the plaintiff. The points which I shall raise here are, 1st, What estate *Thomas* and *Leonard* have by the will. 2^{dly}, What operation the recovery had upon the estate of *Leonard*. *As to the first*, There is not any estate tail to *Thomas*, but another estate, for the limitation to *Leonard* is not upon failure of issue of *Thomas*, but upon failure of issue living at his death. 2^{dly}, The contingency is repeated in the second limitation, and this point hath been agreed in the argument of this case before; but now I shall consider whether *Thomas* hath an estate for life, or a fee determinable. And first, I hold he hath a fee determinable. 2^{dly}, *Leonard* takes by executory devise, and not by way of contingent remainder.

When a particular estate is limited, and the inheritance passes out of the donor, this is a contingent remainder, and in abeyance, *Plow.* 35. a. But if the fee be vested in any person, and to be vested in another upon a contingency; this is an executory devise; and here *Thomas* had a fee-simple immediately, because first he is heir at law to the devisor; and if there had not been any devise to *Thomas*, but if *Thomas* had died, *Leonard* there would have been his heir.

Object.

Object. Here is an exprefs devise to *Thomas* for life, and the remainder here shall be in abeyance, as in *Archer's* case.

Ans. In *Archer's* case, *Robert* had not only an estate for life, but also a reversion in fee-simple expectant upon an estate-tail, and therefore the case is not well reported in 1 Co. 66. b. But the remainder there was of necessity contingent, because it is only a devise in tail, and not a gift of * all the estate; and in our case the question is upon the limitation of the fee-simple. 2dly, *Thomas* hath the fee-simple, because although it be given to him for life only, yet after it is limited to his right heirs; and the words, If *Thomas* hath issue, then, &c. are only declaratory. 3dly, This is the meaning of the will; for the deviser took care for the younger son when the eldest died without issue, as appears by the disposition of the writings by him. 4thly, If the will be capable of divers interpretations, that shall stand which consists with the meaning of the parties, and that is, that *Thomas* shall have fee. * P. 29.

2dly, As to the operation of this common recovery, it seems to me that this executory devise is not barred by it. The reason of a bar in a common recovery, is the intended recompence; therefore if tenant in tail make a feoffment in fee, and the feoffee suffer a common recovery, this does not bar the estate-tail, because the recompence cannot go to the estate-tail; but if the tenant in tail be vouched, then it is a bar, 3 Co. 3. a. the marquis of *Winchester's* case, and fol. 6. a. *Cuppledike's* case. Here the recompence in value cannot go to *Leonard*, because the one estate hath no dependance upon the other, for *Leonard* hath no estate in him, but in contingency. 2. Recompence in value cannot serve a fee after a fee.

3dly, *Leonard* cannot falsify this recovery, because he is quasi a stranger to it, and there is not any privity of estate betwixt *Thomas* and him; and the very same point is resolved in *Pell* and *Brown's* case, *Cra. Jac.* 590. And if *Leonard* that hath only a possibility may falsify, many conveyances may be destroyed: for admit that *A.* upon marriage with *Jane a-Style* makes a feoffment to the use of himself and his heirs till marriage; now by this way if he may destroy this contingency by feoffment or fine, &c. at any time before marriage, it would be very inconvenient.

Finch Solicitor General contra. *Leonard* takes by way of remainder. This case is out of the reason of *Pell* and *Brown's* case, because the devise here was first to *Thomas* and his heirs, and there is not any case in law where the devisee

Term. Mich. 13 Car. 2. B. R.

devisee takes by way of executory devise, but for necessity, as *Dyer* 330. *b. Clache's case*, *Cro. Jac.* 415. *Webb* and *Herring*, and it was adjourned. *Vide post.*

* P. 30. *Wyndham* Justice for the defendant. The principal point in the case is upon the words of the will, what estate *Thomas* had by them; and it hath been objected that *Thomas* * had a fee-simple to avoid a contingency. *Answ.* *Thomas* hath only an estate for life, and not more by the will, because the express words of the will are so. 2dly, If he hath an estate in fee, there ought to be a transposition in the words of the will. 3dly, This construction avoids all the inconveniences which otherwise would happen; for otherwise it shall be to *Thomas* and his heirs by way of executory devise, and so such estate cannot be cut off, as *Pell* and *Brown's case*, *Cro. Jac.* 590. But here is a contingent remainder which may be destroyed, and it is more suitable to the rules of law, as it is agreed in *Colthurst* and *Bejusbin's case*, in *Plowd. Com.*

2dly, When *Thomas* hath only an estate for life, with a remainder contingent, the estate for life being destroyed by the common recovery, the remainder falls to the ground, for the recovery vests a fee in the recoverer, and is a discontinuance to the remainder. *Littleton, sect.* 690.

3dly, Until the contingency happen, the fee descends to the heir in some sort, but not to confound the estate for life, but there shall be an *Hiatus* to let in the contingency when it happens; so is *Archer's case*. If tenant for life grant over his estate, the grantee shall support the contingent remainder; but if he surrender, then the contingent estate is destroyed.

Twisden of the same opinion. The main stress lies upon the construction of the will; If *Thomas* here had been a stranger, and not heir, he had an estate for life, remainder to *Leonard* upon a contingency, remainder to the heirs of *Thomas* upon a contingency, and here the contingency doth not depend on a contingency, but the same contingency which may happen several ways. 2d, *Thomas* being heir, the fee in the mean time till the contingency happen is in *Thomas*, and not in abeyance, *Hutton, Rep.* 118. *Napper* against *Sanders*, and here as to *Leonard*, *Thomas* takes only for life, but by operation of law he hath a fee. And *Archer's case* is express in *Terminis*, for there *Robert* hath an estate only for life by the will, but by operation of law he hath the fee also; and *Pell* and *Brown's case* is not like to this case, because there *Thomas* had an estate to him and his heirs; and in the case of *Howel* and *Auger*, *Hut.* 60. and

Winch.

Term. Mich. 13 Car. 2. B. R.

Winch. 30. The judges will not meddle with the point of limiting one fee upon another. which the lord *Hobart* there calls the mounting one fee upon another; and here the recovery destroys the contingent remainder to *Leonard*.

* *Mullet* and *Foster* Chief Justice of the same opinion; and * P. 31. judgment was given for the defendant, *nisi*, &c.

Widdrington's Case.

DOCTOR *Ralf Widdrington*, fellow of *Christ College* in *Cambridge*, was ejected out of his fellowship by the master and fellows, and he brings a *Mandamus* to be restored to it; and upon this writ the master and fellows return (amongst other things) that if any fellow be peccant he shall be corrected by the master and dean, and if he find himself aggrieved with his punishment, it is lawful for him to appeal to the chancellor of the university, and two senior doctors; and upon this return the court resolved, That doctor *Widdrington* shall not have remedy here; but he ought to resort to the visitors mentioned in the return; for, by *Wyndham*, of every hospital or eleemosynary foundation, appeal ought to be made to the visitors, for they have the supervising of all things concerning them; and if they have no visitors, then the ordinary, *vide Lindwood, Tit. de Religiosis Domibus, cap. Episcop.* & *licebit ei appellare*, is intended, that he may appeal if he will, or acquiesce in the penalty inflicted by the college, and not to give liberty to appeal to a visitor, or to this court. And *Twissden* cited a case 15 Jac. Dr. *Lewys* was elected provost of *Oriel College* in *Oxford* by one part of the fellows, and Dr. *Day* by another part; Dr. *Day* appealed to the bishop of *Lincoln* who was visitor of the college; Dr. *Lewys* appealed to the archbishop, who inhibited the bishop of *Lincoln*; and then Dr. *Day* appealed to the chancellor; and this was referred to the attorney and solicitor general; and resolved the decree made by the visitor was good, and the other ill, and the doctor enjoyed it accordingly; and every one ought to appeal to the next court, *Fitz-herb. Error* 87. And it was adjourned, and afterwards a writ of restitution was denied for the reasons aforesaid. *Vide post.*

Mandamus.

Postea 68.

1 Lev. 23.

1 Sid. 71.

1 Keb. 2, 50.

61, 68, 79,

131, 150,

234, 458.

• P. 32.

* *Fitch versus Smalbrook. Ejectment.*

Evidence.
1 Sid. 51.
1 Keb. 134.

IN evidence upon a trial at bar, it appeared that one *Alcot*, one of the witnesses for the defendant, was before indicted of perjury in the time of *Cromwell*, and verdict against him; but by the death of *Cromwell* judgment was not entered, but all proceedings vacated; and now the counsel of the plaintiff would offer this verdict in evidence to weaken the credit of the witness; but resolved by the court, That the said verdict is now totally destroyed, and cannot be given in evidence.

Traverse versus Meres. Assumpsit.

Assumpsit.
1 Sid. 57.
1 Keb. 135,
146, 163.

THE plaintiff declares, That whereas the husband of the defendant now dead, was indebted to the plaintiff, the defendant promised, That if the plaintiff would manifest and make appear that her said husband was indebted, she would pay it; and avers, that he had been at all times ready to manifest the said debt; and on *Non Assumpsit* found for the plaintiff. And *Allen* moved in arrest of judgment, that there is not any consideration, for that the wife was neither executrix nor administratrix. *Trin.* 51. *Rot.* 1446. *Hunce versus Hinton*. The son of the defendant was indebted to the plaintiff, and the defendant promised upon forbearance to pay; and there judgment was for the plaintiff, because forbearance shall be taken for total forbearance; but if he had said, That if he will forbear him, then it had not been actionable. *Trin.* 8 *Jac.* *Smith versus Jones, Rot.* 882.

Twisden Justice. The difference is betwixt forbearance generally, there is a good ground of action, although the defendant be neither executor nor administrator; but upon forbearance of the defendant it ought to appear that there was some cause of forbearance.

Wild for the plaintiff. The making of the debt appear, is trouble and pains to the plaintiff, and therefore a good consideration. It was adjourned, and afterwards judgment was given for the plaintiff.

Tibbs

THOU *hast stolen our bees (innuendo a flock of bees) they are hidden under the old woman's hemp-seck, and thou art a thief.* On not guilty, and verdict for the plaintiff, Serjeant Merrifield moved in arrest of judgment, that bees are *fera natura*, and felony cannot be committed of them, *Bro. Property* 37. so of trees, &c. *Stroud contra.* The reason of stealing of trees, the words are not actionable, is because they are annexed to the free hold, but not here: and after verdict they shall be intended such bees of which felony may be committed. And words of stealing trees, apples, &c. are actionable, and of corn. *Cro. Jac.* 39. *Kellan* against *Mannesby*, and 114. *Minors* and *Leeford*, 231.

Words.
1 Danv. Abr.
146. P. 32.

Wyndham Justice. There is this difference where he says, *Thou hast stolen my trees, apples, corn, &c.* these words are not actionable: but to say, *Thou art a thief, and hast stolen my trees, &c.* are actionable, because it shall be intended such trees, corn, &c. whereof thievery may be committed; and as to the justification after, that doth not make the words actionable which were not actionable before; and judgment was given for the plaintiff; *nisi, &c.*

French *versus* Kent.

ACTION of the case was brought for forging and contriving a will. This action was brought in *Middlesex*, and the land which is comprised in it, lies in *Suffolk*, and the will being affirmed twice upon trial in an *Ejectione firmæ*, they endeavoured this way to disprove it.

Jones moved to change the venue to *Suffolk*, and resolved it shall be altered; and the court seemed to discountenance such action.

In a replevin in the county, the plaintiff doth not declare, and the avowant removes the cause to the king's bench by *Recordare*, and the plaintiff is non-suited without declaring; and the doubt was, What judgment the avowant shall have; for if he shall have judgment to have a return of the cattle, it doth not appear what cattle were replevied; because the plaintiff hath not shewn them by any declaration; * and it seems the defendant shall suggest what cattle he took, * P. 34. and shall have return of them. *Vide Mich.* 3 H. 8. *Rot.* 649. *Vide postea* C. B. and *Pasc.* 7 H. 7. *Rot.* 130. C. B. The defendant upon a *Non-prof.* makes averment what cattle were taken, and

Replevin.
Nota.
Vide Noy 50.
Webb versus
Hind.

474.
Designey's
Case.

Term. Mich. 13 Car. 2. B. R.

and thereupon a *Return' Habend'* awarded, *si Vic' constare poterit allegationem præd' fore veram. Vide Rastal's Entries Replevin Tit. Frank-tenement in the Old Book, fol. 515. D. Replevin de 8 Cows*, the defendant said that there were more replevied, and upon this it was awarded *quod si Vic' constare poterit*, that the allegation of the defendant be true, he shall make return of the others, *Hob. Rep. 16.* Replevin was brought without naming a place, the count abated, but the defendant to have a return avowed in a place certain.

Barrington *versus* Venables,

Privilege.
1 Keb. 137,
474.

DEBT upon an obligation of 100*l.* After imparlance, the defendant pleaded to the jurisdiction, that none of the privy chamber ought to be sued in any other court at the suit of any person, without special licence of the lord chamberlain of the household for the time being; and that he is one of the privy chamber. The plaintiff demurs, and judgment was, That he should answer over, for such plea cannot be pleaded after imparlance; and the plea it self is ill; and the court seemed to be offended with the said plea.

Memorandum. This term serjeant *John Kelyng* was made the King's Serjeant, and called within the bar in the place of serjeant *Glanvil.*

The King *versus* Read.

Perjury.
1 Lev. 9.
1 Sid. 49, 66,
217.
1 Keb. 127,
138, 163,
182, 191,
198, 213,
214, 230.

* P. 35.

IN an information of perjury, and verdict for the king; the perjury was committed in giving evidence upon a trial in this court betwixt *Dun* and *Dawson*. And *Allen* moved in arrest of judgment because the information was, *Memorand' quod Thomas Fanshaw Miles dat Curia' hic intelligi & informari quod termino St. Hillarii 1659. in Rotulis continetur sic (viz.) That Dun brought his Action; and recites the whole record of it and the trial; and that the said Read falsum præstitit Sacramentum* at this trial; and he moved that it is not * positive that the defendant took a false oath; but that *continetur sic*, that he took a false oath; where he ought to have said after the recital so, *Et ulterius dat Cur' hic intelligi*, that the defendant took a false oath at that trial. And after consideration the court gave judgment against the defendant, because the late precedents are so. And now after verdict it shall be taken a distinct sentence betwixt the recital and the *Et quod*. And by *Wyndham*,

Term. Mich. 13 Car. 2. B. R.

ham, the record recited being in this court, the judges shall take notice how far the record recited extends, and what that is that is positively rehearsed: and judgment was given accordingly.

Stiles versus Trispe.

THERE being a trial betwixt the parties the last assizes Award.
in the country, the parties assented to a reference, and 1 Sid. 54.
a rule was there made of the said reference; and the referees there made an award, the which the defendant refused 1 Keb. 130,
to obey, upon which the plaintiff moved to have the said 138.
rule at the assizes made a rule of this court, according to the tenor of the said rule at the assizes; and it was granted: and then he moved for an attachment against the defendant for not obeying the said award of the referees; but it was denied; for suppose the defendant will deny that any such award was made, this court will not try such issue by affidavits, and therefore they said that it was seldom that any advantage accrued to the parties by such reference.

Dacy versus Linch.

DACY is a witch, and deserves better to be hanged than Words.
Old Arthur, who was hanged for a witch. On not 1 Danv. Ab.
guilty pleaded, and verdict for the plaintiff, serjeant Bear 99. p. 34.
moved in arrest of judgment, because *witch* is only a word 152. p. 16.
of scolding, if it be not coupled with a demonstration that 1 Sid. 52.
he bewitched some creature. *Mich. 8 Car. Cro. Car. 282.* 1 Keb. 140,
George against Harvy. Mich. 15 Jac. Rot. 636. Hutt. 13. 181, 184.
Stone and Roberts. But it was adjudged for the plaintiff; for by *Mallet*, by these shall be intended such a witch that deserves to be hanged.

* *Stevens versus Brittreddge. Ejectment.* * P. 36.

Trin. 12 Car. Rot. 922.

ON a special verdict, Sir Francis Wortley seised of the Discontinuance
lands in question, covenants in consideration of marriage with *Hester* to stand seised to the use of himself for 2 Danv. Ab.
life, the remainder to *Hester* for life, remainder to the heirs 573. p. 10.
males which he shall beget upon the body of *Hester*, remainder to Sir Francis in tail, remainder to *Francis Wortley* son and heir apparent of the covenantor in fee, who is 576. p. 12.
1 Lev. 36.
1 Sid. 83.
1 Keb. 76,
141, 227,
321.

D

lessor

lessor of the plaintiff. Sir *Francis* and *Hester* after marriage in a fine with warranty to the use of *Sarah Wortley* daughter of the said Sir *Francis* and *Hester*, and wife of the defendant, and the heirs of the body of the said *Sarah*; Sir *Francis* and *Hester* die; *Francis* lessor of the plaintiff enters, and the defendant in right of *Sarah* enters upon him, and the sole question was, If *Francis Wortley*, lessor of the plaintiff; be barred by the said fine and warranty.

Allen for the plaintiff. These things are here considerable in the case. 1st, What estate Sir *Francis* and *Hester* had, and if the estate be executed. 2^{dly}, What operation the fine hath. As to the first, Here is not any consolidate estate-tail in them, so that they can be said to be seised in their demesne as of fee-tail; but they have distinct estates; (*viz.*) To Sir *Francis Wortley* for life, the remainder to *Hester* for life, the remainder to the heirs males which he shall engender upon the body of *Hester*.

Object. This limitation of the remainder to the heirs males of both their bodies, swallows up the estates for life.

Answer. Here is not any execution, because all the estates are but one limitation in one conveyance, 2 Co. 60. *b. Wiscot's case*, 39 H. 6. 2. *b.* If lands be given to *A.* for life, the remainder to him and *B.* in fee, there is not any merger, because it is but one conveyance. Then an estate to the wife for life, the remainder to the husband and wife in fee, is an estate for life in the wife, and the fee is in both. 2^{dly}, If a particular estate be limited to two persons, and a remainder is limited adequate to them to drown; as to two for their lives, the remainder to the heirs of them, the estates for life shall be consolidated; as *Lewis Bowle's case* is. But * when there is a particular estate for life or two, and the remainder is not answerable to them; as to three for life, remainder to two in fee, there they shall remain distinct estates; as *A.* tenant for life, remainder to *B.* for life, the remainder to *A.* and *B.* in fee, there shall be no merger of estates; so here the baron hath an estate for life, and the wife another estate for life, remainder to them both. 3^{dly}, There is not any rule or case where the estates may stand; that there shall be a merger; for they shall be so taken that the intention of the parties shall stand.

As to the second. This fine doth not make any discontinuance, admitting that the estates are several. 1. To make a discontinuance there ought to be a seisin of the estate; which is to be discontinued, *Littleton*, sect. 658. Tenant

Term. Mich. 13 Car. 2. B. R.

tenant for life, remainder in tail, he in remainder disseises tenant for life, and makes a feoffment; this is not a good discontinuance, because he ought to have the freehold and inheritance at the same time; *Coke upon Littleton* 347. b. And here is not any seisin by the husband in his demesne as of fee. In the case of *King and Edwards*, Cro. Car. 320. where *Jones* holds it a discontinuance; it is not like to this case, because there the husband and wife have not such divided estates; for the husband there cannot grant his estate distinctly. Here though the estate in remainder vest in both, yet it vests as a remainder, and not to execute the present estate. 2dly, This fine takes its plenary operation without prejudice to any, for by it an intire fee passes, which is the principal reason of *Bredon's* case; and it is not like where there is an interposing estate, as tenant in tail enfeoffs the donor, it is not a discontinuance: but if there be an interposing estate, then such feoffment is a discontinuance, *Garrard and Blizard's* case, Pasch. 29 Eliz. B. R. *Trevillian's* case. Tenant for life, remainder in tail, join in a feoffment, this is not a discontinuance, and here the reversion of Sir Francis doth not impede. Cro. Eliz. 56.

As to the third. Admitting the other points, the warranty operates nothing, because the estate not being divested, the estate to which the warranty is annexed, is determined.

Winington for the defendant. 1. If this fine be a discontinuance of the remainder. 2. If it divest the remainder.

* As to the first, It is a discontinuance. 1. This estate is an estate-tail in them both, *Lit. Sect.* 28. 2. Where an estate for life is limited to the ancestor, the remainder to the heirs of his body, there it is an estate by limitation, and not by purchase. Here Sir Francis and Hester were tenants in tail executed. I agree, that if there be tenant for life, the remainder in tail, the remainder to the heirs of tenant for life, they are distinct estates, as in *Lewis Bowle's* case. But this estate-tail cannot be at any time more executed in the husband and wife than now it is. *Vide* 1 Co. 98. b. 3 E. 3. 31. Here the estate-tail cannot be granted without the estate for life. It seemed to the court that the estate is executed, and doth not differ from *Bredon's* case. But it was adjourned. *Vid. Cro. Eliz.* 135. *Test* versus *Tomkins*. P. 38.

Read *versus* Grapler. *Action sur le Case, sur Assumpsit.*

Costs.

Post 73.
Fitch *versus*
Viner.

THE declaration upon the *Nisi Prius* roll varied from the plea roll, and the plaintiff at the *Nisi Prius* was nonsuit. And now Jones moved that the *Nisi Prius* roll being not warranted by the plea roll, the judge had not any authority to try the issue, and prayed that the *Poslea* might not be entered, according to *Cro. Car.* 203. *Aquila Week's Case*, *Cro. Jac.* 669. *Young and Englefield*. And upon consideration of the cases a *Disfringas de novo* was awarded, and the nonsuit not material. But then the defendant insisted to have costs, and they directed to search precedents. And it seems he shall have costs at the discretion of the court.

Ellison *versus* Ellison.

Amendment.
1 Sid. 70.
1 Keb. 145.
168, 196.
201, 229.

* Page 39.

Hut. 41.

Hob. 127.
More 869.
Brownl. 2.
part. 16.
Scaif *versus* .

IN debt upon an obligation against an executor: The defendant pleads it is not the deed of the testator; and found for the plaintiff, and judgment *quod defendens capiat*, where it ought to be *in misericordia*, because it is a denial of the deed of his testator. And the defendant brought a writ of error. And Foster moved to have it amended; and on this the court directed precedents to be searched. And now serjeant Maynard came and prayed that it might be amended, * because it is error only in the entry, and not in the pronouncing the judgment. *Mich.* 33 & 34 *Eliz. C. B. Rot.* 230. ejectment by John Wyld *versus* Thomas Wheeler, the judgment was *quod prædict' Thomas recuperet*, where it ought to have been John, and it was amended. *Trin.* 19 *Jac.* Mason against Thompson, ejectment of ten acres of land, five acres of pasture, and in the judgment the ten acres of land was omitted, and yet amended. *Mich.* 4. *Car. B. R.* Everard *versus* Bosvile, debt upon 2 E. 6. for tithes, and upon a nonsuit in the judgment *quod Defendens eat sine die* was omitted, and yet amended. *Mich.* 12 *Jac. C. B. Rot.* 1106. Nelson *versus* husband and wife for words, there judgment was, that the husband only shall be *in misericordia*, and nothing said of the wife, yet it was amended. Serjeant Wild *contra*, Every judgment entered upon the roll is presumed to be pronounced by the court, and therefore it is the act of the court, and not amendable. As to the case of the ejectment, John for Thomas, it was only a perfect slip of

Term. Mich. 13 Car. 2. B. R.

of the clerk, and not any precedent that such judgment as this hath been amended. But in the Common Pleas it may be amended, for there are dockets of every judgment, and if the entry of the judgment be defective in the roll, they frequently amend it by the docket. It was adjourned, and after resolved, that it cannot be amended in another term, and ruled accordingly.

Dyer 315. pl.
99. in Cro. El.
84 Crowe's
Case. Judg-
ment reverse
per cest cause,
& Hutt. 41.
Sherley and
Underhill.

Weeden *versus* Baldwin.

Hill. 1659. Rot. 478. Hartford,

EJECTMENT upon a demise of *Henry Baldwin*. On not guilty pleaded, a special verdict was found to this effect, viz. That before the writ one *Thomas Baldwin* and *Katharine* his wife, were seized of the land in *Shoreditch* in the county of *Middlesex*, to them and the heirs of *Thomas*, held of the king by knight service *in capite*. And also the said *Thomas* was seized in fee of the lands in question held in socage; and *Thomas* being so seised devised by his testament in writing the lands in question to *Katharine* for life, remainder to *Henry*, the lessor of the plaintiff, and his heirs, and dies, *Katharine* enters and dies, *Richard Baldwin* as heir to *Thomas* enters, *Henry* enters and demiseth to the plaintiff. *Powis* for the plaintiff. The question is here* if this devise by *Thomas* of the lands in question was good; viz. if he may devise all his lands held in socage. And 1st, It is without doubt a good devise for two parts; and it seems to me a good devise for the whole. 1. Because the husband here hath not the lands held *in capite* at the time of his death, for he hath only an estate in fee in them expectant upon the death of his wife; and therefore a gift to husband and wife, and the heirs of the husband, the husband cannot dispose of the fee, reserving to himself an estate for life, 2 Co. 60. b. *Wiscot's* case. And if the husband dies first, the wife is sole tenant to the lord, and not the heir of the husband, and upon the death of the husband no heriot shall be paid, *Pasch.* 19 R. 2. *Fitz. Herriot* 5. Nor the heir shall not sue an *ouster le main*, although the land was held *in capite*, because it is a naked remainder, *Pasch.* 7 *Eliz.* *Dyer* 237. a. *Macwilliam's* case. 2. And here it is no more than the feme tenant for life, the remainder to the husband in fee; this remainder doth not restrain the devise, because this remainder is not held of the king, because tenant for life is tenant to the king. 9 Co. 126.

Floyer's

Devise. 1
2 Danv. Ab.
541. p. 8.
542. p. 10.
1 Lev. 18.
1 Sid. 55.
1 Keb. 9, 95,
51, 148. 1

* P. 40.

Term. Mich. 13 Car. 2. B. R.

Floyer's case, 2 Co. 92. *b. Bingham's case*, 9 Co. 129. *b. Quick's case*, 134. *b. Ascough's case*.

Objec^t. The words of 34 H. 8. c. 5. the third clause there, are, *Any one having a sole estate or interest in possession, reversion or remainder held in capite*, and this estate of the husband is a remainder.

Answ. Remainder in this clause is intended such which draws to him ward and marriage by the common law, and is in the nature of a reversion, as is to be seen, 10 Co. 81. *a.* The case in point.

Trin. 28 H. 8. *Dyer* 11. *a.* *Bokenham's case*, This very case is put by *Shelly Justice*.

Jones contra. Here the baron hath only the inheritance, and the wife only for life. 2. The king shall have the wardship at the common law in such case: for if there be tenant for life, the remainder in tail, and he in the remainder in tail dies without heir within age, he shall be in ward. 33 H. 6. *a. b.* 27 E. 3. 80. *a.*

Twisden Justice. When there are two jointenants, and to the heirs of one of them, it often has been a question, If he that hath the fee may devise it; and there are opinions both ways.

Wyndham. In such case he cannot devise. But it was adjourned.

* P. 41.

* *Wyndham Justice* for the plaintiff. The devise is good for the whole socage land; and in this case we shall consider, 1st, How this stood at common law. 2. How upon the statute of 32 & 34 H. 8. 3. And how upon the proviso where land is given to two and to the heirs of one of them.

As to the First. *H.* seised in capite expectant on an estate for life, dies during the estate for life, no wardship can be, *M.* 24 E. 3. 33. *b. pl.* 28. *Fitz. Gard* 48. because there is a tenant which may do the service.

As to the second. The statute hath two clauses, and there is not any such person in this case that is intended by the statute; for remainder by the statute is intended such as is in nature of a reversion, the tenant of which shall be in ward at the common law. 10 Co. 81. *Leonard Lovie's case.*

As to the Third. The proviso is for the wardship of the body, but not of the land, and this proviso altering the common law, shall not be amplified. *Amy Townsend's case.*

Twisden and Mallet to the same intent; but *Foster Chief Justice contra*; because this statute of 34 H. 8. is an enacting law,

Term. Mich. 13 Car. 2. B. R.

law, not only in the proviso, but through the whole statute. 2. Though the baron here is so seized, yet his heir may bring a real action, and say, that his father was seized in his demesne as of fee the day he died, as *Wise's* case. 3. The statute was for the benefit of lords, and also the people reciprocally, and here it is a benefit. 4. A judgment or recognizance acknowledged by the husband shall charge this land in the hands of his son. But because the other three justices were against him, judgment was given for the plaintiff.

Wheeler versus Honour. Ejectment.

UPON evidence in a trial at bar, the case was, The defendant was a copyholder of the manor of *Latham*, in the county of *Middlesex*, and upon his admittance the lord, which was *Sir Thomas Reynolds*, lessor of the plaintiff, demanded of him two years purchase for a fine, and assessed it in open court, and acquainted him with it, and appointed him to pay it half a year after. He at the time of the assessment said, that he would pay only three years quit-rent, because the tenants of the manor are by the custom there only to pay so much, and not a fine uncertain. And now the said lord, for not paying the said fine, entered for the forfeiture; and this was the title of the plaintiff. And it seemed to the court, that if there were a real doubt, whether the custom be such that the fine should be certain or uncertain; if the tenant deny to pay an uncertain fine, this is not any forfeiture, although it be found afterwards that the fine ought to be certain; and so it was adjudged betwixt *Parker* and *Cook*. But then such doubt ought to be real, and not covinous. But the counsel of the plaintiff directed to have this point found specially, if occasion be. 2. If a fine be uncertain, and the place and time appointed for payment of it is assessed, it seems that there ought to be a demand, because it is in point of forfeiture: but *Cro. Jac.* 617. *Gardner* against *Norman* is contrary. *Ideo Quare*, And the jury here found for the defendant, That the fine ought to be three years quit-rent.

Copyhold.
1 Sid. 58.
1 Keb. 154.
466.

* P. 42.

Cro. Eliz.
779.
Dalton versus
Hammond.

Delabarre and Delaval versus Yardly.

IN an action on the case part is found for the plaintiff, and part for the defendant; and as to that that is found for the defendant, the judgment is entered *quod querens & plegii*

Amendment.
1 Keb. 145.
155.

Term. Mich. 13 Car. 2. B. R.

plegii sui sint in misericordia; and Baldwin moved that the judgment should be amended, and *plegii sui* struck out, because they ought not to be amerced; and the court gave day to consider of it.

Cook against Newcomb.

Assumpsit.
1 Keb. 158.

Cro. Car. 383.
Lungeen &
Stokes. *Vide*
Barker versus
Smith, Trin.
1651. Rot.
760.

ASSUMPSIT. The plaintiff declares, That in consideration of so much money the defendant promised to deliver so many *livers* within a fortnight, and that the defendant hath not delivered them. The defendant pleads, that within the said fortnight, *scilicet* such a day, he delivered 25 of the *livers*, and then the plaintiff discharged him to deliver more till further order of the plaintiff. That the plaintiff had not given any farther order. The plaintiff demurs; and adjudged for the defendant, that it is a good plea, because a promise before breach may be discharged by parol: but the plaintiff prayed liberty to discontinue his action; and it was granted him, *Nisi*, &c.

* P. 43. * George Foster versus Grace Foster. *Ejectment*.

Durham, Trin. 1659. Rot. 751.

Uses.
1 Lev. 55.
1 Sid. 82.
1 Keb. 160,
225, 274, 319.

THE plaintiff declares, That *Nicholas Foster*, 12 Jan. 1658. at the parish of *Haughton in the Spring*, demised to him 2 messuages, 10 acres of land, 40 acres of meadow, 40 acres of pasture and 100 acres of Moor in *Haughton* aforesaid; To hold from the 30th of *Decemb.* last for five years, and that the defendant did eject him. Upon not guilty the jury found a special verdict, That before the said trespass and ejectment *Margery Foster* was seised of the said messuages, lands and tenements in fee, and the 8th of *Feb.* 1652. by her deed of the same date betwixt her of the one part, and *Mathew Foster*, her son, of the other part, did demise, grant, bargain, sell and set over to the said *Mathew Foster*, his heirs and assigns, all her part and proportion of that capital messuage or farm, which formerly appertained to her father *Robert Brough* deceased, and then in her tenure or occupation, with all houses, edifices, buildings, lands, meadows, pastures, feedings, commons, common of pasture and arable lands whatsoever, as were appertaining or belonging to her part of that farm-hold or tenements with the appurtenances, which the said *Margery Foster* then possessed, then being the tenements in the declaration

ration mentioned. The tenor of which said indenture followeth in these words following, *viz.* Articles of covenant concluded, condescended and agreed upon, 8 Feb. 1652. Between *Margery Foster*, late wife of *William Foster* of *Helton* in the *Hole* in the county of *Durham*, yeoman deceased, on the one part, and *Mathew Foster*, her son, of *Helton* in the *Hole* aforesaid, yeoman, on the other part, as followeth: *Imprimis*, The said *Margery Foster* for divers good causes her thereunto moving, and especially for and in consideration of the sum of 20*l.* of lawful money of *England*, to be paid by him the said *Mathew Foster*, unto the assigns of the said *Margery* at 50*s.* every half year for four years next ensuing after the decease of her the said *Margery*, Hath demised, granted, bargained, sold and set over unto the aforesaid *Mathew Foster*, his heirs and assigns, all her part and proportion of that capital messuage or farm, which formerly belonged to her father *Robert Brough* aforesaid deceased, and now in her tenure or occupation, with
 * all such houses, edifices, buildings, lands, meadows, pastures, feedings, commons and common of pasture, and arable lands whatsoever, as appertaining or belonging to her part of that farmhold or tenement with the appurtenances, which the said *Margery Foster* now possesseth; To have and to hold the aforesaid moiety or part of all the aforesaid premises with the appurtenances whatsoever, unto the aforesaid *Mathew Foster*, his heirs, executors and assigns forever, she the said *Margery* quietly and peaceably enjoying the premises aforesaid for and during her natural life. *Item* the said *Margery* is to have *Mathew Foster's* barn with free egress and regress without let or molestation during her natural life for her full third part of all the houses due to her. In witness whereof the parties above named have hereunto set their hands and seals the day and year first above written. And the jury farther finds, that after (*viz.*) 5 *Novemb.* 1658. the aforesaid *Margery Foster* by her deed of feoffment executed by livery and seisin, as well for and in consideration of the natural love and affection which she the said *Margery Foster* did bear to *Nicholas Foster*, her said son, as for the full sum of 20*l.* did grant, bargain, sell, alien, enfeof and confirm unto the said *Nicholas Foster* the tenements aforesaid with the appurtenances; the tenor of which deed followeth in these words, This indenture made the fifth of *November* 1658. between *Margery Foster* of *Helton*, &c. of the one part, and *Nicholas Foster* of the same, yeoman, son of the said *Margery* of the other part witnesseth, That the said *Margery Foster*, as well for and

in consideration of the natural love and affection, which she beareth to her said son, as for the full and just sum of 20*l.* to her in hand paid, or sufficiently secured by her said son, the receipt whereof she doth hereby acknowledge, and thereof doth acquit, exonerate and discharge him her said son, his executors and administrators, as for divers good and sufficient causes her thereunto moving, hath given, granted, bargained, sold, aliened, enfeoffed and confirmed, and by these presents for her and her heirs, doth give, grant, bargain, sell, alien, enfeoff and confirm unto him the said *Nicholas Foster* all that her capital messuage, farmhold and tenement situate, lying and being in *Helton* in the Hole aforesaid, which descended unto her from *Robert Brough* deceased late of *Helton* in the Hole aforesaid, late father of the said *Margery Foster*, together with all and all manner of houses, edifices, buildings, barns, byars, laithes, stables, yards, garths, tofts, crofts, folds, gardens, orchards, lands, meadows, feedings, pastures, commons, * common of pasture, woods, underwoods, ways, paths, passages, profits, commodities, emoluments and appurtenances to the said granted premisses, or any of them, belonging or in any wise appertaining, or to or with the same, or any of them, now or at any time heretofore held, occupied, used or enjoyed, or accepted, reputed, taken or known as part, parcel or member of or belonging to the same; And all reversion and reversions, remainder and remainders thereof, or any part or parcel thereof; To have and to hold the said capital messuage, farmhold, tenement and premisses with their and every of their appurtenances, to the said *Nicholas Foster*, his heirs and assigns for ever; To be holden of the chief lord or lords of the fee thereof, by and under the rents, duties and services heretofore due, and of right accustomed. And the said *Margery Foster* for her self, her heirs, executors, administrators and assigns doth covenant, promise, grant and agree to and with the said *Nicholas Foster*, her said son, his heirs and assigns, That she the said *Margery Foster*, her heirs and assigns shall and will from henceforth for ever hereafter stand and be seised of and in the said granted premisses, and of every part and parcel thereof, to the use before mentioned and expressed, and to no other use, intent and purpose whatsoever. In witness whereof the parties abovesaid to these present indentures have interchangeably put their hands and seals the day and year first above written, 1658. And the jurors farther say, That the estate to *Mathew Foster* was as well for natural love and affection, as for 20*l.* there mentioned to be paid; and the said

Term. Mich. 13 Car. 2. B. R.

said *Mathew Foster* died, having issue *Thomas Foster*, and the lands in the declaration, and the lands in the deed of 1652. are the same lands, and that *Margery* is yet alive; And that *Nicholas Foster* 12 January 1658. entered into the lands in question, &c. and became seised *prout*, &c. and demised to the plaintiff; and the defendant by the command of *Thomas Foster* entered upon him and ejected him. And if *Grace Foster* be guilty *petunt ad visamentum curiæ*. And if she be guilty, then they assess damages, 2d. and costs 40s. and if not guilty, then not guilty; upon which record the case is shortly such; *Margery Foster* seised in fee 8 Feb. 1652. makes a deed to *Mathew Foster* in this manner: Articles of covenants concluded, condescended and agreed upon between *Margery Foster* of the one part, and *Mathew Foster*, her son, of the other part. *Imprimis*, The said *Margery Foster* for divers good causes, and especially for 20l. to be paid by the said *Mathew* to the assigns of *Margery* at 50s. every half-year for four years next after the death of * *Margery*, hath demised, * P. 46. granted, bargained, sold and set over unto the said *Mathew Foster*, his heirs and assigns, All that, &c. *Habendum* to him, his heirs, executors and assigns for ever, the said *Margery* quietly and peaceably enjoying the premises aforesaid, for and during her natural life. *Item*, The said *Margery* is to have *Mathew Foster's* barn with free egress and regress without let or molestation during her life, for her full third part of all the houses due to her. And this deed had not any execution besides sealing and delivery, and then the said *Margery* 12 Jan. 1658. made a feoffment to *Nicholas* and his heirs, to the use of him and his heirs; *Mathew* dies leaving issue *Thomas*, who commands the defendant to enter.

The only question was, If any estate pass to *Mathew* by the deed of 8 Feb. 1652. by way of raising an use.

Turner for the plaintiff. That no use arises, because 1. At the common law no freehold passes without the ceremonies of livery and seisin, or attornment, *Plowd.* 25. a. Nor by the statute of 27 H. 8. cap. 16. because there it is only by bargain and sale. And *Coke upon Littleton* 271. b. Uses are raised either by transmutation of possession, as by fine, feoffment, common recovery, &c. or out of the estate of the owner of the land by bargain and sale, or by covenant on a lawful consideration. And to raise an use there are four things requisite, *Mich.* 18 Jac. *Winch* 59. *Buckle* versus *Simonds*. 1. Sufficient consideration. 2dly, A deed testifying it; and therefore *Callard* and *Callard's* case was that

Term. Mich. 13 Car. 2. B. R.

that no use could rise by parol. 3dly, The covenantor ought to be seised at the time. 4thly, The uses ought to agree with the rules of common law. Here is a good consideration to raise an use according to *Pledal's case Plowd.* 307. a. But the express consideration is 20l. and this excludes the implied consideration of being her son, *Expressum facit cessare tacitum*, 7 Co. 40. b. *Bedel's case*, 11 Co. 24. b. *Harpur's case*, 4 Co. 80. b. Express covenant takes away a covenant in law, 9 E. 4. 28. If an ordinary refuse a clerk, who is a felon, generally it is good; but if he shew cause of this denial which is not sufficient, as because he wants tonsure or *Ornamentum Clericale*, he shall be fined and compelled to receive such clerk, 5 Co. 97. a. The law never inquires for an assignee in law, when there is an assignee in deed.

Object. The jury have found, that this conveyance was upon both considerations.

Ans. This cannot be aided by averment, *Dyer* 147. a. and it is contrariant; for the deed is found *in hæc verba*, and * therefore the jury cannot find a thing which appears contrary to the deed and record, and which is admitted by both parties. 2 Co. 4. b. *Goddard's case*. 8 E. 2. *Fitz. Error* 78. F. N. B. 205. k.

True it is, there may be two considerations upon the raising an use. 1 Co. 176. a. *Beaumont and Viller's case*. But this is with this difference, when the uses are directed to several persons, and when to one and the same person, as it appears by that case and *Bedal's case* before.

Object. Construction of a deed ought to be such *ut res magis valeat*.

Ans. A freehold shall not pass contrary to the rules of law. 8 Co. 94. *Foxe's case*.

But admit such averment may be, yet it stands not with the rules of law, and that such estate may be so limited, viz. to reserve an estate to her for life, to pass a freehold *in futuro*. 1 Co. 130. a. *Chudleigh's case*, *Trin.* 15 Car. *Peirse versus Pitfield*, and *Dyer* 55. a.

Allen contra. The sole question is, If by the first deed any use be raised to *Mathew* the son. And here are two inquiries. 1st, Abstractive, If the 20l. had not been mentioned if any use would arise. 2dly, If the addition of the 20l. vitiate the operation of the deed for raising an use. As to the first, that an use would have risen, if the 20l. had not been mentioned; at the common law an use was only an equitable right to land, and therefore any contract either by deed or word would create an use; then the statute

tute

Term. Mich. 13 Car. 2. B. R.

tute of uses doth not alter the manner of raising of uses; and therefore in *London* an use is raised by parol, *Dyer* 229. *a. Chibborn's case*, and *Popham* 47. *Callard versus Callard*, and the case of *Dyer* 296. *b.* is not truly reported, for the words were only *in futuro*, and for that cause only the use was not raised, *Cro. Eliz.* 345. *per Coke*, *Mich.* 10 & 11 *Eliz.* *Page versus Moulton*. Promise to make an assurance to his son will not raise an use, and the judgment in *Callard's case* was reversed upon the mistake that an use might be raised be parol. But now it is to inquire what contract will raise an use at this day. And in this consider, 1st, Negatively, where it appears that an estate at common law shall be conveyed by intendment of the parties, there it shall not pass by way of use, as *Foxe's case* is, 2 *Roll's Abridg.* 786, *Trin.* 37 *Eliz.* *Rot.* 149. *B. R. Tebb versus Poplewel*. A woman makes a deed to one, who shall be her husband, the consideration was *causa matrimonii prælocuti*, by the words *Dedi*, * *concessi* & *confirmavi* to the man and * P. 48. his heirs, and no livery; but there was a warranty in the deed. And by *Glench and Fenner* an use doth not rise to the baron; but by *Popham contra*. The reason of the two justices, because it is only a feoffment *causa matrimonii prælocuti*; in this case no judgment is entered. But by *Popham*, If I say, After the death of such an one my son shall have my land, an use shall rise. And in *Vivion's case*, *Dyer* 302. *b. Plowden* would aver that the release there made was *pro fraterno amore*, and so to make an use arise. But this case was compounded, and the daughters at law had a small consideration, and the land was enjoyed against the opinion of *Plowden*. 2^{dly}, When the deed binds to make farther assurance, there no use arises immediately. *Dyer* 162. *Wingfield's case*, *Plowd.* 302. *b.* 307. *b. Bainton's case*, *Dyer* 96. *a.* 235. 3^{dly}, When the deed doth not contain a present declaration of the use but *in futuro*, 21 *H.* 8. 19. *Dyer* 55. *a. Burrow's case*, 1 *Co.* 129, 154. *Lord Paget's case*, Use was void to a stranger, and the case of *Buckley and Symonds* is upon the same reason, *viz.* because the tenor of the deed was only by covenants and words *de futuro* and obligatory, and not declaratory. But in the affirmative, when a covenant and grant is compleat and refers to a future act, there an use arises although the deed be in form of a conveyance at common law, and the word *covenant* is not necessary, as *Bedel's case* is: The word *Grant* raises an use by way of covenant; because covenant is not obligatory, nor hath the effect of a covenant, and with this agrees *Tebb* and *Poplewel's case*; and *Callard's case* was not reversed, because the

Term. Mich. 13 Car. 2. B. R.

the words were only give and grant, but because it was only by parol, *Trin. 1649. Wats versus Dix*, The case as to this point was, that *Wats* granted, bargained, sold in consideration that the bargainee had been at great charges for him for meat and drink, apparel and lodging, and for natural affection, and there was not any money paid, but the deed was inrolled.

Trin. 1657. C. B. Intrat. Rot. 655. Saunders versus Savil. Henry Savil seised of a rent in fee 14 June 18 Car. by indenture gives, grants and assigns to Henry and Mary his wife, and John Savil for and in consideration of good will; Habendum to the said Henry and Mary for their lives, the remainder to John Savil and the heirs of his body. And by Hale and Atkins, Although the conveyance was a conveyance at common law, yet a use did arise thereby; Mich. 1657. *Sympson versus Keyles*, in ejectment, On not guilty *pleaded, a special verdict was, That John Pullen the father seised of land 1 Septemb. 1640. by deed gave to his son in these words, viz. The father in consideration of tender affection hath absolutely given, and livery was indorsed, but not made; and adjudged an use did arise to the son. And a difference taken where the father by feoffment gives to a stranger to the use of himself, remainder over, there no use arises; but when the conveyance is to the party himself, there the use will arise.

* P. 49.

Object. Cro. Jac. 127. Osburn's case.

Answ. There it was good by confirmation, and that was only on evidence.

Object. Hill. 11 Car. B. R. Rot. 439. Pitfield against Pierce in ejectment: On not guilty pleaded, a special verdict found, that Thomas seised in fee makes a deed, which the jury found to be in consideration of marriage, and it was in these words: Know all men that I have given and granted, and do give and grant to John my son the lands in question after my death, Habendum to him and to the heirs of his body. John dies and hath issue Elizabeth, John the father enfeoffs Thomas the second son. And if any estate passed to John, the son, was the question; and adjudged that no estate passed.

But it was answered. This was a plain case, That the lessor of the plaintiff cannot have title; for when tenant for life makes a feoffment, this is a forfeiture. And the reason of this case is within the second rule before laid down, because there is not any present execution, but after death. But in our case here, 1st, There is a deed well executed, for she grants the enjoying it; and *Callard's case* is the

the
fart
He
tw
to
do
Th
rea
tha
the
wo
no
as
the
11
pre
case
ther
whe
aver
ation
noti
jour
men
as
case

T
The
and
was
is n
to h
for
and
Pete
Moo

Term. Mich. 13 Car. 2. B. R.

the same case in point. 2dly, This case is not capable of farther execution, because there cannot be livery. 3dly, Here is allotment of dower. 4thly, When a deed hath two intendments, it shall be construed to establish, and not to destroy an estate. As to the 2d, The addition of 20l. doth not alter the case; the words of the statute are, That the deed ought to be enrolled, when land is conveyed by reason only of any bargain and sale, and here it is not a deed that vests the freehold by bargain and sale only. And if there are two considerations, and both express, then it would be without question, *Plowd. 4. Manxel's case*. 2. If no consideration had been expressed, it might be averred, as *Mildmay's case* is. And although one be expressed, yet the other may be averred.

* *Object.* As to *Bedel's case*,

* P. 50.

Answer. That case is not agreed, but by the council, 11 Co. 24. b. True it is, another consideration shall not be presumed, but it may be averred. And as to *Beaumont's case*, *Dyer 146.* where the difference is, when it is to another person, and when to the same person, that is all one when money is given by a third person. But here needs no averment, because it is for divers good causes and considerations, as well as money; and the court here may take notice of the consideration of him as son; and it was adjourned. And after in *Hill. 14 Car. 2.* upon solemn argument at the bench it was adjudged for the plaintiff. *Vid.* as to this point a good case in *Ley's Rep. 57. Buckley's case, Trin. 15 Jac.* in the court of wards.

Collins and Walker.

TRESPASS for beating and imprisoning his wife, &c. Repleader. The defendant justifies by warrant of the sheriff. ^{r Kcb. 164.} The plaintiff replies *de injuria sua propria absque tali causa*, and issue upon it; and verdict for the plaintiff. And it was moved for a repleader, because *de injuria sua propria* is not a plea to matter of record, but the plaintiff ought to have traversed the warrant. But judgment was given for the plaintiff, because it is good enough after verdict; and so it was resolved betwixt *Osburn* and *Desmond*, and *Peter* against *Stafford*, *Hob. Rep. 244. Vid. 2 Leon. 81. Moor* against Sir *John Savage*.

May

May *versus* Spencer.

Scire facias.

SCIRE FACIAS against the bail upon a writ of error according to the statute of 3 Jac. The defendant prays *Oyer* of the condition of the recognizance, and upon that he pleads that the plaintiff prosecuted the writ of error with effect, and that thereupon the aforesaid judgment was reversed. *Et hoc paratus est verificare*, where it ought to have been *Prout patet per Recordum*. And for this defect the plea was ruled ill, and judgment given for the plaintiff.

* P. 51.

* Hodges *versus* Hodges.

Amendment.

1 Keb. 203,
281, 292,
299, 310, 313.
3 Bullstr. 61.
Haver versus
Gibbons. Noy
Rep. 121.
Thimble-
thorp's Case.
Hetley 59.
Wolfe's Case.
Marth Rep.
17. pl. 40. &
46. pl. 72.
ibid.

ERROR of a judgment in the Common Pleas; The error assigned was, that there were not any pledges: And *Powis* for the defendant in the writ of error, insisted that this is amendable, or at least aided by 18 Eliz. cap. 13. because in the common bench the pledges are always indorsed upon the original, and when there is not an original there are not any pledges; but then the court advised to pray a *Certiorari* upon alledging diminution; and upon return that there was not any original, the court debated it largely. And to *Wyndham* Justice it seemed that it is aided by the statute of 18 Eliz.

But *Foster* and *Twisden contra*. But upon examination, and no diminution alledged, that there was an original, an amendment was awarded. *Vid. Dyer* 288. pl. 53. *F. N. B.* 31. fol. 195. *H. 8 Co.* 61. b. *Beecher's* case.

Orton *versus* Fuller.

Words.

1 Danv. Abr.
106. p. 20.
1 Lev. 65.
1 Keb. 293.
303.

ACTION on the case for words, viz. Orton says, *I am a perjured knave, but he is a perjured knave as well as I; for he and Field swore one for another*: After verdict it was moved in arrest of judgment, because the defendant fires perjury upon the plaintiff only by relation, viz. *As well as I, &c.* But adjudged for the plaintiff.

Term:

Buxton *versus* Bateman. *Derby.*

ACTION upon the case: The plaintiff declares that *Cafe.*
 he is seised of an ancient messuage, and of lands ^{1 Lev. 71.}
 within the parish of S. and that he and all those whose es- ^{1 Sid. 88,}
 tate he hath in them, have time out of mind used to sit in ^{201.}
 a seat in such an aisle in the church in the same parish, and ^{1 Keb. 345,}
 that the defendant had disturbed him, to his damages, &c. ^{370, 386,}
 The defendant pleads not guilty, and found for the plaintiff. ^{420, 433, 457.}
 And *Allen* moved in arrest of judgment, because the plaintiff
 hath not averred that he and all they, in whom he pre-
 scribes, have used to repair the said seat, which he ought
 to have done according to the cases, *Co. 3 Inst.* 202. *Corven*
versus Pym, *Cro. Jac.* 366. *Frances and Ley*, 604. *ibid.*
Dawny and Dee, *Hob.* 69. *Boothby versus Bayly*, 2 *Bulstr.*
 150. *May versus Gilbert*; and the ordering of seats in the
 church being of ecclesiastical conusance, the temporal law
 will not meddle with it, without special reason.

Twisden Justice. I have conferred with most of the
 judges in this case, and they are of opinion that the de-
 claration is good enough without such allegation of repair-
 ing, this being in an action of the case; but if it had been
 in a prohibition, there perhaps it had not been good. But
 when it is as to such house belonging, it is parcel of his
 franktenement, and then he doth not sit there by the licence
 of the ordinary. *Wyndham* and *Mallet* of the same opinion,
 but *Foster* for the defendant. But upon perusal of the re-
 cord it was not *tanquam messuagio prædicti. pertinent.* but only
 that he and all those whose estate he hath in the said mes-
 suage, have used to sit in the said seat, &c. And upon this
Wyndham and the other judges said, that they would ad-
 vise; and upon that it was adjourned.

In this term died Serjeant *Bear* of the county of *Somer-*
set, who was the first Serjeant of the last call.

* P. 53. * *Sir Henry Harbert versus Justinian Paget, Officer of the Court of King's Bench.*

Case.
1 Danv. Abr.
179. p. 1.
1 Lev. 64.
1 Sid. 77.
1 Kcb. 288,
346.

ACTION upon the case: The plaintiff counts that the defendant had the custody of the records of this court, and ought to keep them safely; and that *William Walker* brought an action upon the case against the plaintiff for words, and recites the whole record, and that he recovered against the plaintiff, and had judgment upon it, and damages 106*l*. And that this judgment was entered, that the plaintiff here *Capiatur*: And on this the plaintiff brought a writ of error in the Exchequer chamber, and that pending this writ, the defendant *Paget tam negligenter custodiit* the records, that this error was amended, and made, that the defendant there *sit in misericordia*, by which the plaintiff is made liable to pay the 106*l*. The defendant pleads Not guilty. And now this issue was tried at bar, and upon evidence it was proved, that all the clerks of the office have liberty to go into the treasury and to view the records, and so have the clerk of the *Nisi Prius* for *Middlesex*, and his clerks, and all the philizers of this court, although they are not clerks of the office. And also that the records have been frequently amended after error brought; and in 4 Car. in C. B. in the lord *Savil's* case, it was resolved, That a record may be amended before a *recordatur* entered upon the roll; and upon all this evidence the jury found for the defendant.

Wheatly versus Thomas.

Attainder.
1 Lev. 73.
1 Kcb. 349,
436, 549,
615, 745.

* P. 54. **I**N ejectment. On not guilty, a special verdict found that *George lord Cobham* being seised in fee of the lands in question 13 Jan. 1557. made his will and devised them to *Anne* for life, remainder to *William* for life, remainder to the first son of *William*, remainder to *George* for life, remainder to his first son, &c. And having two daughters *Eliz.* and *Katharine* limits them to *Elizabeth* for life, remainder to *Katharine* for life, remainder to the heirs males of his brother *Thomas*, remainder to the heirs of the body of *William*, his eldest son; *George* dies 4 & 5 Ph. & Mar. *Anne* dies, *George* dies without issue; *William* hath issue, *Henry* and *George*; *George* hath issue *William*; *William* hath issue *Pembroke*; *William* enters, *Henry* enters, *Henry* and *George* are * attainted 1 Jac. In 3 Jac. an a*ct* is made re-citing

citing the attainder, and confirms it; and then follows a proviso in these words, Provided, and be it enacted, That the manor of *Cooling* (the lands in question) shall be and remain, and be held and enjoyed to *Duke Brook*, and the heirs males of his body, remainder to *Charles*, remainder to *William Brook*, and the heirs males of his body, remainder to such estates-tail as are mentioned in the will of *George* the devisor: Sir *William* the son of *George* 7 *Jac.* was restored; *Henry* dies 13 *Jac.* Sir *William* survives and hath daughters *Pembroke*, *Hill*, *Margaret* and *Frances*, Sir *William* the father of *Henry* dies, 39 *El.* *Frances* one of the daughters of Sir *William* demises to the plaintiff.

Baldwin for the plaintiff. The point is upon the act 3 *Jac.* which takes notice of the attainder of *Henry* and *George*, by which *Frances* hath good title as heir of the body of *William*, eldest son of *George*. 1st, This clause is relative to the will of *George*, just as if it had been particularly recited, and so is the construction of relative clauses in grants, 9 Co. 30. a. 20 E. 3. Bro. Patents 31 and 91. so in acts of parliament, *Flow.* 130. *Buckley* versus *Thomas*.

1. *Obj.* The words of this proviso are imperfect, (*viz.*) and for default of such issue shall be for such estates in tail, and doth not mention the estates.

Answ. In an act of parliament words ought to be taken according to common parlance, as in *Arbitrement*, &c. and so held and enjoyed are sufficient.

2. *Obj.* At the time of this act *Henry* was attainted of treason, and alive, and so no person in esse to take as heir of the body of *William* at that time.

Answ. By this act there are five estates-tail to be spent before the will of *George* is to take place, (*viz.*) of *Duke*, *Charles*, *William*, *Calisthenes*, *John*; and then comes the will of *George* by this act, and there is no estate in that will to *Henry* in particular; and it is sufficient if the estate take effect when the particular estates are determined. 1 Co. 63. *Archer's* case. And though in strict and legal sense *William* had not an heir at that time, yet *Henry* dying before the particular estate spent, the daughters shall take, and the daughters are heirs, as appears by the record; for *Henry* died 17 *Jac.* Suppose these four daughters should bring a *Formedon* by the aid of that act of 7 *Jac.* they shall mention *Henry* and *George* in the writ, because that act purges the attainder.

* 2. The intent of an act of parliament ought to be observed in its exposition, and that was here, that as long as there was any issue of *George* in being, the land should not

* P. 55.

Term. Mich. 14 Car. 2. B. R.

revert to the crown, for they had a care that none of the remainders should be barred; and heirs here shall not be taken as in a conveyance, but in an equitable sense, as 8 *Affises* pl. 5. *per Thorpe*, 8 Co. the *Prince's* case.

3. This act is *quasi* an act of restitution, which is *materia favorabilis*, Co. 3 *Inst.* 241. I agree if this act had limited immediately estates according to the will of *George*, it had been a doubt whether good; but here it is after five estates-tail spent.

Jones for the defendant. This act of 7 *Jac.* hath no operation in this case, because there is a proviso in it, that it shall not extend to the lands forfeit for treason.

2. *Henry* at the time of his attainder had two estates in him, (*viz.*) one in possession, and another in remainder; I agree that the relative words make the thing pass as well as if they had been *verbatim* expressed; but here *Henry* cannot take as heir to *William*, which he must do, if he takes at all, (*viz.*) by purchase; and when a man takes by purchase, all the estate ought to be described, *Hob.* 31. and 34. *Ashenhurst's* case; so in *Foster* and *Ramsay's* case, a devise to the heir of his brother, who was an alien; he could not take.

Object. He is capable of taking when the remainder falls.

Answer. There is no intent that there should be any contingent remainder. *Et adjournatur.*

Wynne *versus* Lloyd.

Error to reverse a Common Recovery in Wales.

Antea 16.

Error.
Postea 70, 96,
134.
3 *Danv. Ab.*
49. p. 7.
1 *Lev.* 72,
130, 146.
1 *Keb.* 351,
388, 459,
717, 748,
809, 914.
1 *Sid.* 213.

UPON the *Scire facias ad audiendum errores*, the Sheriff returned several ter-tenants, who pleaded several pleas, the one that he is but tenant for years of the demise of one *Owen*, another that there are other ter-tenants of the land, (*viz.*) *A. B. &c.* not named in the writ, judgment of the writ. A third, That the plaintiff had entered into part pending the writ: To these pleas the plaintiff demurred.

Allen for the plaintiff. That these pleas are none of them good, because should these be allowed, the plaintiff might be infinitely delayed.

* P. 56.

* *Williams* for the defendants, That these pleas are good, because the ground of a *Scire facias* to the ter-tenants, is, that they may shew something to maintain their possession, and

Term. Mich. 14 Car. 2. B. R.

and they may either plead in bar or abatement, and they may demand oyer of the record, *Dyer* 321. a. and they may have a release to plead, they may plead jointenancy, *Hill* 42 *Eliz. Cro. Eliz.* 739. *Holland* versus *Dansey*. See in the same book 129 *Charnock* versus *Worsley*, *Cro. Jac.* 332. *Bartholomew* versus *Belfield*. Then as to the plea of entry of the plaintiff pendant the writ, it is a good plea in abatement. 1. Because the nature of a writ of error is not to bar the right of the land, but to the action; and it lies not but when the plaintiff is prejudiced, and here the plaintiff is not prejudiced so long as he continues in possession, be his possession right or wrong; so for this reason the bail shall not reverse a judgment given against the principal, because it is but a consequential prejudice. 2dly, The end of the writ of error is to have restitution, which he needs not, when he hath already entered; but here is a difference between possession by act in law, and when by the act of the party. *Bridgman* 56. *Lloyd* versus *Bethil*. 2dly, As to the plea that he is but tenant for years, it is a good plea, for it is no more than an aid prier of him of whose lease he holds. *Owen* 157. *Carew* versus *Warren*. So the parol shall demur upon such a *Scire fac.* for nonage, *Cro. Jac.* 392. *Herbert* versus *Binion*.

Object. It is in the discretion of the court to grant a *Scire fac.* in such case to the ter-tenants.

The court hath now awarded one, and the tenants now may have those advantages as are incident thereunto; and there are many pleas which the ter-tenants may now plead, which after the reversal of the judgment they cannot plead, as a release of errors.

The court was of opinion that the pleas are but frivolous, and awarded that they plead in chief. *Vid. postea*.

Hurst's Case.

ONE *Edward Hurst* an attorney of the town-court of *Canterbury* being turned out by the commissioners within the late act for corporations, moved now for a *Mandamus*, and though it was suggested that it is a place concerning the administration of justice, and a precedent shewn *Mich.* 1651. in the case of an attorney in *Southwark*, yet • *Foster* and *Wyndham* denied it, but *Twissden* and *Mallet* allowed it; so the court being divided in opinion no writ could be had. *Post.* 94.

Mandamus.

Postea 94.

1 *Lev.* 75.

2 *Sid.* 94.

152.

1 *Keb.* 349.

354, 387.

558, 675.

* P. 57.

Southcot

Southcot *versus* Rider.

Account.
1 Danv. Abr.
229. p. 27.
234. p. 2.
1 Keb. 354,
395.

ACCOUNT against the defendant as his receiver; The defendant pleaded that the 20*l.* in demand was delivered to him by the plaintiff to pay over to such persons as Sir George Monk, &c. should think fit, and that they did award that they should deliver it over to one Hatchall, &c. *absq; hoc*, that he was his receiver *ulter vel alio modo*; and verdict for the plaintiff, and judgment *quod computet*; and before the auditors he pleaded a special plea; (*viz.*) The act of oblivion; and upon that the plaintiff demurred.

Jones for the plaintiff. It is not a good plea, because it ought to have been pleaded in bar to the action, and not before auditors, for otherwise such suits will be endless.

Polexfen for the defendant. Many things may be pleaded in bar and in abatement too, 41 E. 4. 31. 9 E. 4. 15. Bro. Accompt 43 and 48. Latch. 59. Hopton *versus* Offal, and payment to the plaintiff or a stranger is a plea in discharge, and yet may be pleaded in bar, Rast Entr. 16. 19 H. 6. 5. and this is a proper plea in discharge, for otherwise it would be infinite. The court seemed that the plea was well enough, but the defendant pleads ill as to the time, and when the plaintiff charges him as receiver from such a time to such a time, he must answer that precisely; and for that cause judgment was given for the plaintiff.

Hole Executor of &c. against Bradford,
Executor of B.

Executor.
1 Sid. 88.
1 Keb. 344,
356.

DEBT upon the statute of ministers for tithes against an executor. The defendant pleads *Nil debet*, and verdict for the plaintiff. Stroud moved for the defendant, that this action shall not charge the executor, it not being a duty in the testator. But, by the court, the executor is chargeable, because it was a duty in the testator; but escape lies not against the executor, because the action is founded *ex delicto*; but it lies upon the statute of 2 Ed. 6. * for tithes; and judgment was given for the plaintiff by the whole court.

* P. 58.

Baker

Term. Mich. 14 Car. 2. B. R.

Baker *versus* Berisford. *Covenant*,

Trin. 1657. Rot. 1902.

THE plaintiff declares, that *Abraham Baker* was seised Custom.
in fee of copyhold land in *Westham* in the county of 2 Danv. Abr.
Essex, and alledgeth a custom in the said manor of *West-* 440. p. 9.
ham, that the wife shall be endowed of the moiety of all 3 Danv. Abr.
such copyhold lands as her husband was seised of, and that 387. p. 6.
Abraham died having a wife named *Mary*, who had a moi- 1 Lev. 154.
ety of the said land assigned her for her dower, and that 1 Sid. 76.
John his son had the other moiety, and that *Mary* and *John* 2 Sid. 1. 9.
joined in a lease for years to the defendant, rendering 100l. 1 Keb. 285.
per annum (viz.) 50l. to *Mary*, and 50l. to *John*, and that 356, 480, 509,
John dies, and the plaintiff as his widow demands 25l. 515, 838, 893.
And on *Nil debet*, and verdict for the plaintiff,

Jones moved in arrest of judgment, That the breach is not according to the custom, because the wife is but to have a moiety, but here she claims a moiety of a moiety, and a custom ought to be pursued strictly; but by the court it is directly within the custom, and adjudged for the plaintiff.

Billing's Case.

BILLING was committed to the Marshalsea for divers Charge.
misdeemeanors, and he being in prison for the said of- 1 Keb. 303.
fences was charged with actions, and judgments obtained against him; and the court was moved he might be discharged of those actions; and resolved by the court, When a man is in prison for criminal matters he is not chargeable with a civil action without leave of the court; but if he happen to be charged, *fieri non debuit, sed factum valet*, but they ought to have moved the court first; but now once charged he cannot be discharged.

* *Dove versus Darkin. Ejectment.*

* P. 59.

JUDGMENT was given against the defendant, and he Error.
brings a writ of error, and assigns for error, that the 1 Lev. 80.
plaintiff was dead at the time of the judgment given. The 1 Sid. 93.
plaintiff's entry is, That the aforelaid plaintiff by *A. B.* 1 Keb. 368,
his attorney *venit & dicit*, that he is in life, and issue there- 375, 413.
upon, and found for the plaintiff in the writ of error that he was dead; and Serjeant *Maynard* moved that the judgment might be reversed.

Allen

Term. Mich. 14 Car. 2. B. R.

P. 31 H. 6. 15. *Allen contra*, Because there ought to have been a *Scire fac.* against the executors of the party dead.

Wild. There is neither executor nor administrator.

Wyndham Justice. It is well enough, and a precedent comes near it, *Rafal's Entries*, *Tit. Brief in Mort.* pl. 1. fol. 108. And it was adjourned. *Post.*

Wiseman versus Cotton. Hill. 13 Car. 2.

Rot. 476.

Customs.

Postea 76.

2 Danv. Abr.

441. p. 2.

1 Lev. 79

1 Sid. 17,

135.

Hard. 315.

1 Keb. 288,

372, 492, 505.

THE plaintiff counts, That whereas there was a discourse concerning the manor of *Farningham*, and the plaintiff affirmed that it was devisable by the custom of *Kent*, in consideration that the plaintiff would give the defendant 5*s.* the defendant assumed to give the plaintiff 40*s.* if it were not devisable, and avers that it is not devisable. The defendant pleads that it is devisable by custom; and upon that a special verdict, That by act of parliament 2 E. 6. the lands of Sir *Henry Isles* amongst others should be from henceforth to all intents, constructions and purposes as lands at the common law: They find that lands in gavelkind are devisable; and if the act of parliament takes away the other collateral qualities, as well as the partibility, was the sole question.

Jones for the plaintiff. By this act all qualities of gavelkind are taken away.

Winington for the defendant. Devisable or not, is not an essential quality of gavelkind. *Lambert's Perambulation* 584, 585. *Spelman's Glossary*, *Gavelkind* 412. 1 *Inst.* 140. *Lambert* 25 and 26. As for other particular customs they ought to be * specially alledged, as dower of a moiety, 2 E. 4. 18. b. 5 E. 4. 8. but gavelkind ought not; but the court takes notice thereof, *Cro. Car.* 561. *Launder versus Brook*, and *Davies* 50. *Adjournatur.* But the court inclined that the act had not destroyed this quality. *Post.*

* P. 60.

Mould versus Wallis. Covenant.

Covenant.

1 Lev. 81.

1 Sid. 142.

1 Keb. 376,

469, 512.

THE plaintiff declares upon an indenture of apprenticeship. The defendant pleads, That at the time of the entering into the said indenture he was an infant. The plaintiff replies, That by the custom of the city of *London*, if one under age binds himself an apprentice, that it shall be good against him. The defendant demurs.

Jones

Term. Mich. 14 Car. 2. B. R.

Jones for the defendant. It is a departure. 1 *Inst.* 304.
a. If *H.* intitle himself in his former plea by the common law, in his second plea he shall not enable himself by a custom, but should have pleaded it at first; so is *Keikw.* 75.
b. the abbot of *Bokesaff's* case.

Howel for the plaintiff. The case in 21 *H.* 7. pl. 29. is otherwise, where in assize the defendant pleads feoffment of a stranger: The plaintiff replies, That the feoffor was an infant; The defendant rejoins, That there was a custom that he might make a feoffment at fifteen; and resolved no departure: 'Tis true, 37 *H.* 6. 5. there was a departure, because he began with a general custom, and concluded with a particular one; and this seems to be good by *Cro. Car.* 652. *Walker* versus *Nicholson*; but no judgment is there given.

Wyndham Justice. It is not any departure from the title, but only a plea to the disability.

Twisden Justice. *Hutt.* 63. *Jennings* versus *Pitman*, seems to make it a departure, *Cro. Car.* 179. *Guilbert* versus *Fletcher*. The action here is founded upon the covenant, and he doth not come in the replication and maintain his action, but answers to the disability, and so no departure.

Jones. The book of 21 *H.* 7. 17. is contrary to *Yelv.* 14. *Adjournatur.* *Vide Godb. Rep.* 122. the same case pl. 143. *Moor* 135. pl. 280. *Stanton's* case, *ante*, *Granger* versus *Hembrough*.

* *Lawson* versus *Witherington*.

* P. 61.

DEBT upon an obligation conditioned to pay 100*l.* upon the tenth day of *January*, upon three months warning. The defendant pleads that the plaintiff had not given three months warning. The plaintiff demurs.

Condition.
2 Danv. Ab.
68. p. 8.
1 Lev. 85.
1 Keb. 380,
415.

Weston for the plaintiff. I conceive three months warning shall be taken upon any tenth day of *January* after three months warning given by the plaintiff, and if it shall be so taken, then the defendant's plea is but in abatement of the writ, and so he pleading in bar, it is naught. *Cro. Eliz.* 202. *Isbam* and *Paget* versus *Hitchcock*.

Twisden Justice. Pleading in bar when it is in abatement, is not good.

Wyndham Justice. Although it had been to pay on the tenth of *January* after the date of the obligation, upon three months warning by the obligee, though the obligee omit

Term. Mich. 14 Car. 2. B. R.

omit the warning, yet the money shall not be lost; and so it hath been resolved in the time of *Roll* Chief Justice, and the other shall be bound to pay it at any three months warning. *Adjournatur.*

Saunders *versus* Edwards.

Case.

1 Danv. Ab.

212. p. 5.

1 Sid. 95.

1 Keb- 389.

IN an action on the case, the plaintiff counts that he is a clerk of the inrolment office, and that the defendant *Crimen felonie ei imposuit*, by which he had like to have lost his office. The defendant pleads, That as to the imposition of felony, otherwise than by speaking of scandalous words, not guilty; and as to the speaking of the words, *non infra duos annos*. The plaintiff demurs.

Wild for the plaintiff. This is not within the statute of limitations, no more than slander of title.

Jones for the defendant. The imposition of felony is actionable by it self, and then the other words are within the statute.

Wild. *Crimen felonie imponere* cannot be by words alone, but by some act, as carrying him before a justice of peace, &c.

Twisden Justice. If the words are actionable at first, then the damages after do not give cause of action; and the first plea is a full bar, and the other fruitless, and of that opinion was the whole court; and so judgment for the defendant, *nisi*, &c.

* P. 62.

* James Norfolk *versus* Aylmer.

Sheriff's Bond.

1 Lev. 209.

1 Keb. 391.

DEBT upon an obligation, conditioned that whereas *Smith* was committed to the Serjeant at arms by the House of Commons, if the said *Smith* shall be a true prisoner, and pay all fees due, &c. that then, &c. The defendant pleads the statute of 23 H. 6. The plaintiff demurs.

Powys for the plaintiff. A serjeant at arms is not within that statute, for it begins with keepers of gaols, and a serjeant at arms is above such a one, according to the rule given 2 Co. 46. and the office of serjeant at arms is properly to attend the house, and not to be a keeper of prisoners. It is true, that *Cro. Eliz.* 66. *Bracebridge's* case is, That the Marshal of the King's Bench is without question within that statute. Serjeant at arms within the marches

Term, Mich. 14 Car. 2. B. R.

marches of *Wales* is out of this statute. *Cro. Car.* 309.
Johns versus Stratford.

Levinz for the defendant. This obligation is void by 23 H. 6. for it is within the words of the statute, which are keepers of prisons, or other the officers aforesaid. *Cro. Eliz.* 108. *Trussel versus Aston.* And as to the objection that a serjeant at arms is above a sheriff, I deny it, and here this statute ought to be taken according to equity, as sometimes penal statutes are, *Trin.* 9 H. 6. 19. pl. 13. Debt by the mayor of the staple, *Plow.* 35. Debt against the keeper of *Ludgate*, *Dyer* 321. Debt against the marshal. 2dly, This condition is void at the common law. 1st, It restrains trade and livelihood, 2 H. 5. 5. and *Owen* 143. 2dly, That he shall pay all fees due, &c. until he shall be discharged by the House of Commons, which may never be, because they may be dissolved, &c. 3dly, It is an obligation to pay fees before they are due, which is extortion. *Co.* 2 Inst. 210. *Hut. Rep.* 52. *Et adjournatur.*

Davies versus Jones.

FOR words of a Broker, speaking of his profession, *He Words.*
is a cheating knave, he hath cheated me with brass money. 1 Keb. 393.
After verdict *Pemberton* moved in arrest of judgment, and cited *Hutt.* 13. *Gitting versus Redseam's* case; but resolved by the court, That to call a tradesman a cheat, an action will lie if he speaks of his profession; but to speak it generally it will not; and adjudged for the plaintiff.

* *Littleboy versus Wright.* Error, *Marshall's.* * P. 63.

ACTION upon the case for words (*viz.*) *You are Jurisdiction.*
a whore, &c. per quod she hath lost her marriage, and 2 Danv. Abr.
verdict for the plaintiff and judgment; and now serjeant 300. p. 4.
Maynard assigns for error, That it doth not appear that the 1 Lev. 69.
cause of action, (*viz.*) *That the loss of marriage* was with- 1 Sid. 85, 95.
in the jurisdiction of the court, and the other words are 1 Keb. 318.
not actionable, and for this cause judgment was reversed.
Vide Cro. Car. 570. *Ireland versus Blackwel, contra.*

Term.

* P. 64.

* Term. Hill. 14 Car. 2. B. R.

Sir Robert Foster, Chief Justice.

Sir John Mallet,

Sir Thomas Twisden,

Sir Wadham Wyndham,

} Justices.

Memorandum, The last vacation John Hern Secondary died,
and Thomas Fekel of Essex succeeded him.

Palmer *versus* Richard.

Disconti-
nuance.

REPLEVIN. The defendant makes conusance to *A.* That one *Knight* was seised in fee of the place in which, &c. and granted a rent-charge to *A.* and so makes conusance for ten years rent. The plaintiff replies in bar, that *Knight* was not seised in fee, and the defendant demurs. And serjeant *Wild* moved for the plaintiff to amend his plea, because it doth not appear by the whole record that *Knight* is dead; and then, though *Knight* be not seised in fee, yet if he be alive the grant shall be good during his life.

Twisden. If *Knight* were alive at the time of the distress, the defendant ought to justify; for if tenant for life grant a rent, if the grantee distrain, and after tenant for life dies, he ought not to make avowry nor conusance, but to justify, because the taking was lawful. In this case the record being entered, *Read* for the plaintiff came too late to have it amended; but then *Wild* moved to have leave to discontinue, and it was granted.

* P. 65.

Eliot *versus* Blake.

Covenant.
1 Lev. 88.
1 Keb. 424,
426.

IN covenant, The plaintiff declares upon an indenture dated 7 Sept. 1657. whereby the defendant covenants, that he one *T. W.* would deliver to the plaintiff so many maunds of salt-peter at such a rate before the 20th of

October

Term. Hill. 14 & 15 Car. 2. B. R.

October ensuing, the plaintiff paying so much a maund, and to the performance thereof the defendant binds himself in 500*l*. The defendant demands *Oyer* of the deed, and by the same it appears, that between the same covenant and the obligation, there is a proviso, That if the defendant should between that and the said 20th of *October* be disabled by the sea, &c. to deliver the said salt-peter, then the deed should be void. The defendant pleads, That he within the time aforesaid had prepared one thousand maunds of salt-peter, and that the boat wherein it was put was cast away, and so he was disabled. The plaintiff replies, that the defendant had sufficient salt-peter over and above what was cast away; and issue thereupon, and found for the plaintiff, and damages 300*l*. And *Allen* for the defendant moved in arrest of judgment, That there is a variance between the deed and the declaration, for in the declaration the proviso is omitted.

Jones for the plaintiff. 1*st*, The action is brought upon the covenant, and not upon the penalty, and the reciting of the penalty is but surplusage. 2*dly*, The declaration is sufficient without recital of the proviso, according to *Ughtred's* case, and the defendant ought to plead the proviso; and of this opinion was the whole court; and judgment was thereupon given for the plaintiff.

The King versus Gislifer.

THE churchwardens and overseers of a parish in the county of *Derby* place a child, which was the bastard child of one *Mary Newton* with the defendant, according to the statute of 43 *Eliz. c. 2.* and do appoint the defendant to receive the said child; the defendant appeals to the sessions, and there the justices make an order, that the defendant shall take the said child as his apprentice; and now the defendant brought his *Certiorari* and removed the said order into this court.

* *Allen* moved to quash the said order; and some exceptions he took to the form of it, (*viz.*) 1*st*, It doth not appear that this child was a poor child. 2*dly*, Nor in what trade he shall be an apprentice. But to these exceptions the court answered; 1*st*, That it shall come on the means he could, he'd construe the stat. to compel the party, because it was so advantageous a thing to the common-wealth. But the business was referred to the justices of assize, who ordered that *Steers* should take an apprentice, and for disobeying this order, an attachment was granted.

Apprentice.
1 Lev. 84.
In a Case between the parish of *Henton* in *Kent* and *Steers*, 1654.
B. R. The Question was. Whether the Defendant was compellable to

* P. 66.

take an Apprentice, by 43 *Eliz.* And *Rolls* Chief Justice said, That if by any

so advantageous of assize, who ordered

other

Term. Hill. 14 & 15 Car. 2: B. R.

other part that she is not a child within the statute. And 2dly, Husbandry is intended by that statute, and so shall be construed to be meant in the order until the contrary do appear. But the main question upon the order was, Whether the defendant within this statute may be compelled to take an apprentice. And *Allen* moved that he could not. 1st, By this statute the churchwardens and overseers may bind out such an apprentice as well out of the parish as within it, and then it shall be inconvenient that strangers shall be compelled in this case. 2dly, The words of the act are, *That it shall be binding to the apprentice, as if he or she had been bound themselves by indenture*; so that the intent of the act was, That the apprentice chiefly should be bound, and not be chargeable again to the parish, and not the party who may be but tenant at will. 3dly, This act extends over all England into corporations, *London, &c.* And if any one shall be compelled to take an apprentice, an alderman or any other person of quality may be charged to take such an apprentice.

Bigland contra. That it hath been the received opinion so amongst the judges from time to time. And at length per *Foster, Mallet and Wyndham* the order is good; but *Twisden contra.* And *Wyndham* said the judges of *Serjeants Inn* in *Chancery-lane* were divided in this case. And *Twisden* said that the judges in *Fleet-street* were of his opinion; and thereupon it was ordered, that the order should be confirmed; and that the law might come in debate, an information should be exhibited against the defendant for not performing thereof.

Braham versus Aspinal, C. B. Error.

Vifne.

* P. 67.

IN debt upon an obligation, conditioned to pay money at the house of one *Yarrow* in *Woodstreet magna, London.* The defendant pleads, that he paid the money at the said house in *Woodstreet*, but names no parish, and upon that a *Venire fac.* issues to the parish of *St. Michael Woodstreet*, and found for the plaintiff, and judgment; and the defendant brings a writ of error, and after the record certified, * alleges diminution in the *Venire fac.* and upon the return thereof it appears to be as before, and the now plaintiff assigns this for error, for that the parish of *St. Michael* is not named in any part of the record.

Twisden. The words of the statute of 21 *Jac. cap. 13.* are by reason the vifne is sued out of more places or of fewer

Term. Hill. 14 & 15 Car. 2. B. R.

fewer places than it ought to be, so as one place be right named, are to be intended when some of the places are named in the record: And therefore if an action is laid in *D.* and a *Venire fac.* issues *de Corpore Comitatus*; there although the *Venire fac.* be awarded to more places, yet it is not good, because the body of the county was not named before in the record; and it was adjourned: But afterwards it was ruled good being after verdict, because it shall be intended *St. Michael* is in *Great Woodstreet*; and judgment was affirmed.

The King *versus* Hardy.

INDICTMENT of a forcible entry, for entering into a copyhold, and that the defendant *ejecit & disseisvit* the party: And *Powis* moved to quash it, because it ought not to be *disseisvit* upon 21 *Fac. cap.* 15. and so is *Coke 4 Inst.* 176. in the margin; and for this cause the indictment was quashed.

Indictment.
1 Keb. 423,
428. 435.

Stonehouse *versus* Bodvil.

THE plaintiff declares upon an *Indebitatus assumpsit* for physick, wares and commodities provided and delivered for the daughter of the defendant at his request; after *Non assumpsit*, and verdict for the plaintiff, *Williams* moved in arrest of judgment, because it is a collateral promise, and so no debt, and consequently the plaintiff ought to have declared specially: But the whole court resolved it well enough. For that, 1st, It is for wares provided and delivered (*for*) not (*to*) the daughter of the defendant, and so after a verdict it shall be intended delivered to the defendant for the daughter. 2^{dly}, An action of debt will lie for this; as if the father desire one to find physick for his daughter, debt lies against the father, and so *Indebitatus assumpsit*; and judgment was given for the plaintiff.

Assumpsit.
1 Danv. Abr.
27. p. 10.
1 Keb. 439,

* *Sir Edward Bathurst versus Cox.* Mich. 14 Car. 2. * P. 68.
Rot. 783.

DEBT for 40s. imposed as a fine upon the defendant at a court leet of the plaintiff's, for a contempt there committed; the contempt was, *That he put on his hat in the court*, and upon the steward's admonishing him of such

Contempt.
2 Danv. Ab.
292. p. 8.
1 Keb. 451,
465.

Term. Hill. 14 & 15 Car. 2. B. R.

such his doing, he answered, *I do not value what you can do.*
And adjudged for the plaintiff.

Vernon versus Alsop.

Condition:
2 Danv. Abr.
24. B. p. 4.
1 Lev. 77.
1 Sid. 105.
1 Keb. 356,
415, 451.

THE plaintiff declares upon a bond of 14*l*. The defendant demands *Oyer* of the condition, which is, That if the defendant pay 2*s*. a week till 14*l*. be paid, and upon default of payment the obligation shall be void. The defendant pleads, That the 17th of *October* such a year he made default of payment; judgment *fi assis*. The plaintiff demurs, and adjudged for the plaintiff, because the condition is senseless, and then the obligation is in force and single.

If *H.* be convicted upon verdict upon an information or indictment, his fine ought to be set in open court, and not privately in the judge's chamber.

Dr. Widdrington's Case.

Mandamus.
Antea 31.
1 Lev. 23.
1 Sid. 71.
1 Keb. 2, 50,
61, 68, 79.
131, 150.
234, 458.

DOCTOR *Widdrington* having formerly brought his *Mandamus* to be restored to his fellowship in *Christ's College Cambridge*, and upon that the master, *Dr. Cudworth*, and the fellows made a return which seemed to the court sufficient, and thereupon he could not obtain a writ of restitution; but he finding that the return was very false, brought his action upon the case, and thereupon a reference was procured to certain commissioners, (*viz.*) The bishop of *London*, the lord chamberlain, and some of the judges; and upon hearing the whole business *Dr. Widdrington* was cleared, and awarded to be restored: And now he moved by *Allen*, That in regard the return was scandalous, and might hereafter tend * to his disparagement; and since the other side were willing that all things before past might be buried in oblivion, the said return might be taken off the file, which he said might be, since all parties concerned were consenting thereunto. But the court did somewhat doubt of that, they not knowing any precedent for the withdrawing any record of the court: but they made a rule, that the record should be dashed through in the nature of a cancellation; and with that *Allen* was content.

* P. 69.

Townsend's

Term. Hill. 14 & 15 Car. 2. B. R.

Townsend's Case.

TOWNSEND having served as an apprentice for seven years, in Oxford, with a tailor, his master refused to make him free; and serjeant Holloway moved to have a *Mandamus* to be directed to the mayor and others to make him free; and though at first it was doubted whether such a writ would lie any more than for one who had seven years studied the law to be called to the bar, yet it was at last agreed, because it differed from the case of the barrister; for in the last case there is no person to whom the writ should be directed; but here the mayor and corporation are to be commanded to do it; and if this writ would not lie, it would be a great discouragement to trade; and a precedent was shewn, *Pasch. 18 Car. in Norwich*, of a *Mandamus* granted by *Bramstone*. *Vide postea*.

Mandamus,
1 Lev. 91.
1 Sid. 107.
1 Keb. 458,
470, 659.

Manfer versus Shelley.

THE plaintiff obtained a judgment in debt, and received the money, and made a letter of attorney to another that he might acknowledge satisfaction; and afterwards, and before satisfaction acknowledged, revokes his warrant: And *Allen* moved that the attorney might proceed, and that the court might save him harmless; and the court gave rule, that no proceeding should be upon the judgment without motion first made in court for it. *Vide Latch fol. 8*.

Revocation.
1 Salk. 87.

* Wynne versus Lloyd.

* P. 70.

THE dilatory pleas being now over-ruled, the plaintiff in the writ of error assigned errors, which were now argued.

Error.
Antea 16, 55.
Postea 96,
134.
3 *Danv. Abr.*
49. p. 7.
1 Lev. 71,
130, 146.
1 Keb. 351,
388, 459, 717,
748, 809, 914.
1 Sid. 213.

Finch solicitor general for the plaintiff. Here is a recovery against the vouchee, who appears by attorney, and there is no warrant of attorney; And 1st, All recoveries are erroneous if the party does not appear either in person or by attorney, and here is no good warrant, because the commission to take a warrant of attorney issues before the summons *ad Warrantizandum*, which is, 1st, Contrary to the nature of a warrant of attorney to be given before plea pleaded; and a general warrant of attorney is not good. 2^{dly}, It is contrary to the words of the commission, which

F

says,

Term. Hill. 14 & 15 Car. 2. B. R.

says, that a writ of summons now dependeth. *Cro. Jac. fol. 11. Arundel versus Arundel.*

2. The caption of the warrant of attorney is naught, because before the commission. 3. This shall not be supplied by an intendment, that there was another *dedimus*, and that this cannot be right, because, 1. The writ of error commands to send up the record *cum omnibus ea tangentibus*.

2. 'Tis a *Dedimus* between the same parties.

Object. *Cro. Eliz. Johnson and Pavie's case* was objected.

Ans. There is nothing there could falsify that intendment; but here are strong presumptions to the contrary; so is *Cro. Jac. 392. Herbert and Binion's case.*

Williams contra. Here is a good record in a common recovery, and the errors alledged are only in the way, and proceedings thereunto. 1. These errors are repugnant to the record of the recovery it self, and not assignable, no more than that there was no such person as the judge before whom the recovery was had. *Mich. 38 and 39 Eliz. Cro. Eliz. 531. Hober's case. Yelo. 33. Arundel versus Arundel.* Then as to the errors themselves, here are all the necessary parts of a recovery. As to the first, of a *Dedimus* being before the warrant of attorney, these things are to be considered. 1. The nature of a *Dedimus*, that it is not any part of the recovery. 2. Admit it to be a part, yet it is no substantial part, and so helped by the statute. 3. The common practice. 4. The judgments in these cases. 5. The course in *North-Wales*. 6. The warrant here upon the roll. *As to the first,* At common law a fine or recovery could not have been levied by *Dedimus*, for the statute of *Carlisse 15 E. 2.* gave first the *Dedimus*; but that statute is only directory, and at the discretion of the court; and *5 Co. 38. a. Tey's case*, and *40. Dormer's case*, where the parts of a fine are reckoned up, a *Dedimus Potestatem* is no part thereof; and this objection had been pertinent to have stopped the judgment, but now *factum valet*, as *Tey's case* was. *As to the second,* It is helped by the statute of *27 Eliz. cap. 9.* as a *Venire fac.* wanting, or as *Norris's case* cited in *Gage's case*, *5 Co. 45. b.* *As to the third,* It is the constant practice. *As to the fourth,* Recoveries have always been construed favourably for the upholding of them, and therefore a common recovery may be of an advowson, *5 Co. 40. Dormer's case*; and yet a writ of entry will not lie thereof, *4 E. 3. 162.* So it shall bind an infant, *Cro. Car. 224. Newport's case*, and variance in a fine hurts not; *Cro. Jac. 77. Earl of Bedford's case.* And a like

Term. Hill. 14 & 15 Car. 2. B. R.

a like error in a fine alledged, and allowed well enough, *Cro. Eliz.* 275. *Argenton and Westover*. As to the fifth, It is the constant course in *North-Wales* to take fines before *Dedimus*. As to the sixth, Here is a good warrant upon the record.

Twissden Justice. There is a great difference between a fine and a recovery; for a *Dedimus Potestatem* is not part of a fine, but a warrant of attorney is part of the recovery; and it was adjourned. *Post*.

William Bailly *versus* Thomas Birtles and Katherine Ux. ejus, *Executrix* of Richard Bailly.

IN an action upon the case, the plaintiff declares, That he the 26th of Oct. 12 Car. 2. was possessed of a cow of the value of 4l. 10s. and being so possessed 23 Nov. in the twelfth year he did deliver the said cow to the said Richard in his lifetime, to keep the same in his pasture safely for the use of the said William, to the said William to be redelivered when Richard should be requested; which cow the said Richard afterwards, (*viz.*) the said 23d of November did sell and deliver to one William Wodard for 4l. 3s. 4d. and the said monies did convert and dispose to his own use; and that the said Richard in his life-time, nor the defendant after his death *dum sola*, nor the defendants after marriage did not pay the * 4l. 3s. 4d. The defendants plead that their testator was not guilty; the jury find him guilty *ad damnum* 4l. 3s. 4d. and 53s. 4d. for costs; and in arrest of judgment it was moved by Bigland, because this is a tort for which the executor is not liable to answer, but *moritur cum persona*.

Case.
1 Keb. 273.
395.

* P. 72.

Raymond for the plaintiff. I agree that things which imply a wrong in themselves, as *actio personalis moritur cum persona*, as the wrongful taking of the profits of the land, *Cro. Eliz.* 206. *Tooley versus Wyndham*: so of an escape or any misfeasance: but for non-feasance the executors shall be chargeable; as for not payment of money levied upon a *Fieri facias*, as *Cro. Car.* 539. *Dickenson versus Gilford*, this very difference agreed; for non-feasance shall never be *vi et armis*, nor *contra pacem*, 9 Co. 50. b. *Count de Salop's* case; for this reason an action lies against the executor upon 2 E. 6. for tithes: So this term, *antea fol.* 57. *Hole* against the executors of *Bradford* for fifths due to the widow of a sequestered person. But notwithstanding this the court said it was a tort, and that the executor ought not to be charged with it. *Mes vide Savile Rep.* 40. *difference prise*, 3 Leon. 241. Sir *Brian Tuck's* case.

Suit in the Ecclesiastical court against an executor, for tithes not paid by the testator, Register Orig. 48. p. Fulbecks Tit. Prohibition, fol. 6.

Needham an Attorney of this court prayed for the filing of a *Scire facias*, which was sued forth five terms ago against the bail, and two *Nichils* returned upon the same, and he had neglected the filing of it; but the court would not grant it.

Fitch *versus* Vinor.

Cafe.
Antea 38.
Read *versus*
Grapler.

IN an action upon the case, the plaintiff at the *Nisi Prius* was nonsuit, because the *Nisi Prius* roll is, That the plaintiff was in such a benefice in the year 1662. whereas the plea roll is 1626. and so the plaintiff is destitute of his proof; and now *Wild* serjeant moved to set aside the nonsuit according to *Week's* case, *Cro. Car.* 203. and it was adjourned.

Turnor *versus* Felgate.

Intr. Trin. 1656. Rot. 130.

Execution.
3 Danv. Ab.
325. p. 2.
2 Sid. 125.
1 Sid. 107.
1 Lev. 95.
1 Keb. 453.
478, 482,
488, 822.

* P. 74.

THE case was thus, *Felgate* recovered against *Mole*, and *Turnor* was his bail; *Felgate* obtained execution against *Turnor*, and his goods were levied; and thereupon *Turnor* moved the court, for that there was some miscarriage in the proceedings against him in obtaining that execution, because there was no *Ca. fa.* sued out against *Mole*, that the matter might be referred to Mr. *Hern* the secondary; and upon his examination he found the process unduly sued forth, and so the execution was superseded against *Turnor*, and a vacate made of it; and then *Turnor* brings trespass against *Felgate* for taking his goods, and upon debate upon a special verdict the plaintiff had judgment, and recovered damages for his goods taken; and now *Turnor* * brings a *Scire facias* to have restitution for his goods taken upon the aforesaid erroneous execution, and for which he had already recovered damages in an action of trespass; and upon

upon
seder
have

IN
Care
and
Willi
of th
the v

Al
action
it wa
in B.
perju
166.

2.
pedun
and tr
no m
and so
staid u
ruled,
and be

F
action
an ea
grante

Not
made
a judg
or Mi
other
not to
innate

Term. Pasch. 15 Car. 2. B. R.

upon motion made by *Felgate* the *Scire facias* was superseded as being a very unreasonable thing for *Turnor* to have double satisfaction.

The King *versus* Wright.

INFORMATION of perjury set forth, that Sir *John Perjury*.
Lee brought trespass in *C. B.* for cutting of trees against *Garward*, and that the defendant there pleaded Not guilty; and upon the trial there the defendant swore that the said *William Garward ultimo Junii 12 Car. 2.* did cut sixty trees of the value of 80*l.* *ubi verba* he did not cut sixty trees of the value of 80*l.* and verdict against the defendant.

Allen moved in arrest of judgment. 1. In recital of the action brought in *C. B.* and the issue joined, it is said that it was awarded, *Quod venire faceret hic quodecim*, which is in *B. R.* and so the trial was *coram non Judice*, and then no perjury can be committed. *Yelv. 111. Pain's case, 3 Inst. 166.*

2. It is said, that in that action *Jurata ponitur in respectum coram Domino Rege*, so an action is begun in *C. B.* and tried in *B. R.* and it is not after a verdict, for there is no mention of a verdict to be in that action of trespass, and so not helped by any statute; and for this cause it was staid until, &c. But afterwards the exceptions were overruled, and judgment against *Wright* to stand on the pillory, and be fined 20*l.*

The Earl of Stamford *versus* Gordal.

FOSTER moved that the defendant might put in good bail to the plaintiff's action; for although the action is but for words, yet the same being spoke against an earl, the court may compel special bail; and it was granted, *nisi*.

Note; Justice *Twisden* declared, That there is a rule made among the judges, when any one prays a *Certiorari* at a judge's chamber, to remove an indictment out of *London* or *Middlesex*, he ought to give notice of his desire to the other side three days before, otherwise the *Certiorari* is not to be granted; and there it was questioned whether an inmate be a nuisance at common law.

Whitehead

* P. 75. * *Whitehead versus Brown. Error in the Palace Court.*

Court.
3 Danv. Abr.
301. p. 10.
1 Lev. 96.
1 Keb. 481,
512, 522.

IN an *Assumpsit* the plaintiff declares, that the defendant was indebted to the plaintiff within the jurisdiction for nursing a child; and for error it was alledged, that it is not set forth that the nursing was within the jurisdiction.

Twisden. The jury within the particular jurisdiction cannot take notice of that which was done out of it.

Wyndham. There is a difference between a debt arising upon a collateral act, and an *Indebitatus Assumpsit*; for in the later it is a debt every where, as it is a duty vested in the plaintiff.

Foster Chief Justice. In debt for money due upon the sale of an house, the plaintiff must shew that the house is within the jurisdiction; but when it is indifferent to the court, where the debt may arise, it shall be presumed (to be within the jurisdiction of the court.

Twisden. Particular jurisdictions are not to be supported by implication and intendment; and it was adjourned.

Harvy versus Martin.

Words.
1 Keb. 483.

THE plaintiff declares, that he is, and hath been, and was such a day the master of a bark. And the defendant said to him, *Thou art a cheating knave and a cheating rogue, and thou hast cheated my son-in-law, John Bradley, of a cable-rope, which belonged to the bark.* On Not guilty, and verdict for the plaintiff, *Jones* moved in arrest of judgment, because the words are not applied to the plaintiff's profession as he is master of a bark, as *Hill. 1656. Geigh-ton versus Kiffen*, of a reeder, *You cheated Mr. Rawley of a pannel of reed*, is not actionable. *Wyndham* seemed for the plaintiff. *Twisden.* I remember the case of the reeder. *Et adjournatur.*

* P. 76. * *Wiseman versus Cotton. See before, 59.*

Custom.
2 Danv. Ab.
441. p. 2.
1 Lev. 79.
1 Sid. 17, 135.
Hard. 325.
1 Keb. 288,
372, 492, 505.

ALLEN for the plaintiff. The act of 2 E. 6. hath taken away the custom of devising, and the custom of gavelkind is altered to all purposes, and that appears, 1st. From the words of the act. 2. From the meaning thereof. 3. From the construction that hath been made thereupon. *As to the first*, The words are, *That the lands*

be

Term. Pasch. 15 Car. 2. B. R.

be clearly changed, and be no wise departible, and shall be from henceforth to all intents, constructions and purposes as lands at the common law, and as if they had been of the nature of gavelkind. As to the 2d, the meaning, every act of parliament ought to be interpreted according to the words, if there be not a particular reason to the contrary.

Here it is objected, That the words shall only refer to the partibleness.

Ans. In construction of an act of parliament that is most reasonable which makes all the words thereof operative. 2. If that had been the meaning thereof, there was no reason why the words should be so general, (*viz.*) to all constructions and purposes. 3. The meaning was, that their estates should be altogether according to the common law, they being gentlemen, it being prejudicial, that their lands should be according to the custom in gavelkind; as to devise is inconvenient in the opinion of gentlemen of that country. And by the custom of gavelkind upon a writ of right four essors ought to choose the grand assize, and not the knights. And the grand assize ought to consist of gavelkind men. As to the 3d, The construction and consequence of law upon this act, 1. The custom of devising is of the same nature of being endowed of the moiety, of being tenant by the curtesy without issue, and other customs. Now consider the form of pleading these customs. The book of customs of Kent, *Vet. Magna Charta* 147. b. begins thus: *These are the customs which the men of Kent do claim in their gavelkind tenure.* So that gavelkind is the mother custom, *Pasch. 4 E. 1. C. B. Rot. 2. Margeria que fuit uxor Johannis Daggenham petit medietatem of such land.* The defendant pleads, *Quod mulier amittet dotem si, &c.* The plaintiff replies, *Quod bene & verum est que la est tiel custom, mes el ne unque fuit covert secundum legem de gavelkind.* The defendant rejoins, *Quod fornicata est.* The jury finds that it is not necessary by such custom, * and that the law of gavelkind ceases when gavelkind ceases. * P. 77. 2. These customs are taken notice of to be incident to gavelkind, and there needs no prescription for them, but only in gavelkind, *Fitzh. Aid* 114, 129. *Rassal, Dover in Demand* 6. There, for the moiety of dower in gavelkind, the custom is only laid in gavelkind; but it is other of dower of a moiety in a city, for there the custom is more particularly alledged. *Ibid. pl. 7. in Norwich.* So in *Process* 1, & 2. and *Voucher* 10. Object. To be indowed of a moiety is not incident to gavelkind; for in *North-Wales*, where is gavelkind land, the feme is not dowable of a moiety.

Ans.

Term. Pasch. 15 Car. 2. B. R.

Answ. There it is otherwise.

Object. It ought to be otherwise alledged.

Answ. The gavelkind is thus pleaded, and so are the cases put upon it; and the case 5 E. 4. 8. b. pl. 23. is mistaken; for where it is said there, *That they ought to prescribe*, it should be, *That they ought not to prescribe*, for otherwise it is not sense; *Quod curia concessit*.

Wild serjeant for the defendant. Where an act is dubious we ought to consider, what was the mischief which it intended to prevent. Now the mischief here was the division of families. 1 *Inst.* 140. b.

Wyndham justice. If it had been the intent of the parliament to take away all gavelkind customs, they would have mentioned more than only the partibleness.

Twisden accordant, and he denied the opinion of *Lambert*, *That if the king purchase gavelkind land, that it shall go to all his sons*; for *Lambert* had it out of *Plowden* 247. a. from *Southcote's* opinion; and he from 35 H. 6. 28. a.

Mallet and *Foster* of the same opinion. And judgment was given for the defendant.

Nurse versus Barns.

Damages.

THE plaintiff declares, that the defendant in consideration of 10*l.* promised to let him enjoy certain iron mills for six months; and it appeared that the iron mills were worth but 20*l.* *per annum*, and yet damages were given to 500*l.* by reason of the loss of stock laid in; and *per Curiam* the jury may well find such damages, for they are not bound to give only the 10*l.* but also all the special damages.

* P. 78.

* Par *versus* Evans.

Court.
1 Keb. 489,
500, 515,
542, 552.

A PROHIBITION was prayed to the court of admiralty, for that the plaintiff here did sue upon a recognizance there, taken by way of stipulation, by one that was but surety in the nature of bail; and that court not being a court of record, they cannot take any recognizance. *Noy* 24. But after long debate resolved, in favour of trade, such a stipulation is good, and shall bind the sureties. *Vid.* *Godbolt* 260. *Greenway versus Barker*, pl. 359.

Term.

* Term. Mich. 15 Car. 2. B. R. * P. 79.

Sir Robert Hyde Chief Justice.

Sir Thomas Twisden,
Sir Wadham Wyndham, } Justices.
Sir John Keeling,

Memorandum, This last vacation Sir Robert Foster Chief Justice of this court died, and the first day of this term Sir Robert Hyde was sworn Chief Justice.

Murch *versus* Lands.

AT a trial at the *Nisi Prius* the plaintiff changed the *Trial*.
Venire fac. and panel, and had a jury which the *1 Keb. 561,*
defendant knew not of, and he moved by Jones for a new *667.*
trial. And Twisden justice upon that cited a case upon a
trial at *Essex* assizes, in which the jury was changed. And
resolved by all the clerks of that court in the time of *Hosden*
secondary, that the defendant cannot be aided, if the first
Venire fac. was not filed, because the defendant may have
resort to the sheriff and have view of the panel to be pre-
pared for his challenges. But if the first *Venire fac.* was
filed, then the defendant shall have a new trial; and after
this the defendant took care to file the *Venire facias*: And
upon this case put by Twisden the court inclined against a
new trial; but it was adjourned to inquire of the clerks for
the course in this court.

* Kitchin and Knight *versus* Buckley.

* P. 80.

Intr. Trin. 15 Car. 2. B. R. Rot. 1256.

THE case was, That two tenants in common bring co-
venant against lessee for years for not repairing the

Sid. 157, 1 Keb. 565, 572. Vide Bendl. 89. Kel. 114. 2.

Covenant.
2 Danv. Ab.
239. p. 1. 1
Lev. 109. 1
Kel. 114. 2.

thing

thing demised, and whether they ought to sever or join was the question after verdict for the plaintiff; and the court inclined they ought to join, because it was a personal action; but it was objected, that it favoured of the realty. And where *Littleton* speaks of actions personal, it is to be intended that the action is grounded upon the contract or possession of the plaintiffs; and it was adjourned.

Afterwards *Jones* argued for the plaintiff, and cited *Littleton*, Sect. 311, 312. In all actions real tenants in common shall not join; but in personal, where damages only ought to be recovered, there they shall join, as in debt for rent; and that to *Kelw.* 114. a. I oppose *Pafch.* 18 H. 6. 6 & 7. That tenants in common may join in a forger of *Faux faits*; they shall join in detinue for deeds, 1 *Inst.* 197. b. And they shall join in a *Warrantia Chartæ*, 1 *Inst.* 97. and *Hill.* 28 E. 3. 90. b. pl. 12. which is intended there by *Coke*. They shall join in waste in the *Tenuit*, *Moor* 40. pl. 127. *Baldwin pro Defendente*. In all actions personal, where the possession is concerned, there they shall join, *Littleton*, Sect. 315. In mixt actions they may either join or sever, as in a *Parco fracto*, *Moor* 452. pl. 617. So in account, *Godb.* 90. pl. 101. So if two tenants in common make a lease for years rendering rent, and then one of them dies, the executor and the survivor shall join in debt, or they may sever at their pleasure. But if the lease be for life, they ought to sever. *Godbolt* 283. pl. 404. and *Dyer* 326. pl. 1. *Huntley's case*. Debt by one tenant in common against lessee for years, and a demurrer upon it, and *Moor* 40. pl. 127. In actions that favour of the realty they shall not join, as in a *Cessavit*, nor in an assise, *Lit. sect.* 314. nor in an avowry, 317. And this action favours of the realty; and so it was ruled in *Mich.* 1657. B. R. *Baker* and *Berisford*, Bro. Joinder in Action, 35.

Hide Chief Justice. Although the thing of which, (*viz.*) the house, is in the realty, yet the action is not so.

* P. 81.

* *Twisden* justice for the plaintiff, and also *Wyndham*; and as to *Berisford's* case it is not law.

Kelyng justice. The case of *Littleton* is upon the personal contract; but it is a question if the tenements be conveyed over, and this contract destroyed, if the tenants in common may join. And in all cases by *Litt.* the parties are jointenants of the profits; but here it is a covenant, and this concerns the profits, and so of necessity they ought to join; and judgment was given for the plaintiff.

Pain

Two tenants in common may join in an action upon the case for obstructing a water-course, Noy 135. *Stone versus Browick*.

Term. Mich. 15 Car. 2. B. R.

Pain was convicted of perjury upon an information at Perjury. common law for giving evidence, and was sentenced to stand on the pillory two days, at *Westminster* and *Aldersgate-street*; and to be imprisoned a month without bail or mainprize, and fined 100*l*.

Long *versus* Emot.

EJECTMENT was brought in this court, of lands in the county of *Lancaster*; and upon trial the judge at *Lancaster* assises caused the *Postea* to be marked, and to be moved in court, if it lies, the defendant being in custody; and it was adjourned. *Vid. Mich. 2 R. 3. 18. pl. 45. Hill. 27 H. 6. 6. a. pl. 35.*

Ejectment.
Postea, Ned.
ham *versus*
Benet, *Fi. fa.*
al *Chester bors*
de B. R.

Farr was indicted at common law for forgery of a warrant of attorney, and he demurred upon the indictment, and adjudged against him, and his sentence was, That he shall be set upon the pillory the first day of the next term with a paper, and then at the *Exchange*, and pay 100 marks, and imprisonment during the pleasure of the court.

Forgery.

Hawes & Uxor *versus* Wheeler.

THE plaintiff brings an action in *London* for these words, *Thou art a whore and my husband's whore*, and the defendant removes this by *Habeas Corpus* into this court, and *Simpson* moved for a *procedendo*; and it was granted by three justices, *Hide* chief justice dissenting.

Words.
1 Lev. 116.
1 Keb. 578.

* Some part of this term I attended in C. B. during which * P. 82. time *Bridgman* chief justice argued this case that follows.

Bate *versus* Amherst and Norton. *Sussex. C. B.*

EJECTMENT for lands of the demise of *Peter Underwood*. Upon Not guilty pleaded, the jury found a special verdict to the effect following: *Stephen Norton* seised in fee of the lands in question the 20th of *February* 1651. made his will in writing, and by it gave divers legacies, (*viz.*) 300*l*. to, &c. Item. *I give to my brother Anthony Norton*, 30*l*. per annum. Item, *I give all my land in Kent and Sussex to one of my cousin Nicholas Amherst's daughters that shall marry with a Norton within fifteen years. And I make Nicholas Amherst my executor. Nicholas Amherst* had three

Devise.
2 Danv. Abr.
515. B. p. 6.
Eq. Ab. 212.
P. 5.

three daughters, *Elizabeth*, *Anne* and *Mary*; *Stephen Norton* the defendant marries *Elizabeth*; the lessor of the plaintiff marries the heir at law. And the sole question was, if the heir at law or the devisee shall have the land.

Bridgman chief justice. Here are two things to be considered, 1. Here being a devise to one of the daughters of *Nicholas Amherst*, who marries with a *Norton*; if this devise be not void for the uncertainty; If it had been to one of the daughters without more saying, it had been without question void, for two may marry with a *Norton*. But as to this point all agreed, that the devise is good notwithstanding the uncertainty. As to the second point, admitting the devise is good in respect of the person; yet if it be good altogether, because here is an immediate devise to one of the daughters who marries with a *Norton*. 2. Being limited to *Nicholas Amherst* to gather rents, &c. and then to *Nicholas* for fifteen years, and then to the devisee that shall marry with a *Norton*. As to the first, although the words are not, *who shall first marry with a Norton*, yet it is all one with them, for these reasons: First the law supplies these words in a deed, 6 Co. 36. b. the bishop of *Bath's* case. 2. In the king's grants, if two constructions be made, and one makes the grant void, then the other shall stand; so here. 3. It is agreeable with the reason of the law, because a thing which once vests shall not after be divested. 4. *Non præsumitur pluralitas*, that more than one shall marry with a *Norton*, and the words in the will fix in a single person. And there is a difference when there is incertainty in the * event, and when in the person, as in all cases of contingencies: And as to *Taylor* and *Sayer's* case, *Cro. Eliz.* 742. that is not law. As to the second point, If it had been immediately devised to the daughters, then if a devise to such of the daughters as should marry a *Norton* be good. 2. *Nicholas* his interest for fifteen years be determinable upon the marriage of one of the daughters with a *Norton*. As to the first construction, without question there may be a contingent executory devise without an estate precedent limited to that, because it leaves an estate in the deviser and his heirs till the contingency happen; and where it is to a stranger till such a thing happen, there is difference betwixt them, the reason of law holds in both. If I covenant to stand seised to the use of such a son as *J. S.* shall name, it is a good conveyance, if he nominate, 1 Co. 176. b. *Mildmay's* case, 8 Co. 95. a. *Manning's* case. And here it is to be considered if *Amherst* had an estate for fifteen years, here he leaves nothing to the heir, because *Nicholas* had the profits till marriage,

Term, Mich. 15 Car. 2. B. R.

riage, and then to the daughter; and then it is a devise made to one for years, the remainder in contingency, which is void. 1 Co. 130. a. *Popham* 3. The case of the earl of *Bedford*. But here is a contingent certain, as 2 *Bulstr.* 127. *Robert's* case, and *Jay* and *Brown's* case in C. B. The question is if good by immediate devise, *Dyer* 304. pl. 50. A devise to an infant *in ventre sa mere* is not good. So a devise to a college which is not yet erected, *Hob* 32. *Cunden* and *Clerk*. In an executory devise it is not void, but shall descend to the heir in the mean time. 1. Although in a conveyance a freehold cannot commence *in futuro*, yet in an use or a devise it may. As a devise or feoffment to the use of A. after my death, remainder over, is a good conveyance, because it rises out of my estate. *Mich.* 13 Car. 1. B. R. *Long* against *Smith*. In case of a devise, *Cro. Eliz.* 919. *Hainsworth* versus *Pretty*, and 878. *Pain's* case. Devise to J. S. for fifteen years, remainder to the right heirs of J. D. is not good; but for fifteen years, remainder to the first son of J. D. is good; because the devisor takes notice that he hath not a son, and intends a future a&c, and the law aids him which was *Inops consilii*; so here the devisor intends futurely.

As to the other point, That if it were an immediate devise, it is a devise to an infant *in ventre sa mere* for 15 years, if it be with a remainder over it is good by way of executory devise. An estate *in futuro* and a contingent precedent makes an executory devise; these executory devises were grounded upon the common law, as *Goodcheap's* case, 49 E. 3. 16. a. cited * in the lord *Stafford's* case, 8 Co. 76. * P. 84. b. 7 Co. 9. a. 11 H. 6. 13. a. *Bro. Devise* 32. And the words of the statute of 32 H. 8. are not that H. devises to any person or persons, but at his will and pleasure; and see *Cro. Jac.* 394. *Blandford* versus *Blandford*; and so he concluded for the defendant, and judgment was given accordingly.

In the case of one *Ferrars*, against whom an information was exhibited for forgery: It was resolved by all the justices, That although the jury be charged and sworn in the case of a plea of the crown, yet a juror may be drawn or the jury dismissed, contrary to common tradition, which hath been held by many learned in the law.

Herbert

Herbert *versus* Tuckal. *Ejectment.*

Evidence.
2 Danv. Abr.
516. p. 5.
Eq. Ab. 172.
p. 4.
1 Sid. 162.

UPON evidence in a trial at bar the question was, If one was of full age at the time of his will made by him. And upon evidence it appears, that he was born the 14th of February 1608, and he made his will when he was of the age of 21 years within two days; and to prove his nonage the defendant produced an almanack, in which his father had writ the nativity of the devifor, and it was allowed to be strong evidence.

The King *versus* Burgefs, &c.

Restitution.
1 Sid. 149.
1 Keb. 334,
343, 538,
600, 614.

ON an indictment of forcible entry removed here in B. R. The defendant pleads to it in bar of restitution the statute of 31 Eliz. cap. 11. That F. S. is tenant for life of the tenements, and that he was in possession for the space of three years and more before the indictment, and that the defendants as servants entered as to them best seemed fit; and upon this plea the king demurs.

Winnington for the king. 1st, Here being particular estates set forth in the plea, it is not shewn how they commenced, which ought to have been. 2. It appears, that the parties indicted have not any estate, but that they are only servants to him who hath the estate. 3. They entered as servants, and it is not well pleaded where the command was made.

Jones for the defendant. As to the 3^d, the constant pleading over-rules this; for to say, *That he entered as servant*, without saying *by his command*, is well enough. As to the 2^d, * they are within the statute, because their possession is the possession of their master, and so the statute intends. As to the 1st, This plea is not like to a plea where a man is to derive an estate.

Hide chief justice. As to the 1st, Although it had been only said, *That she was in possession for three years*, it had been good enough. As to the 3^d, The command is not traversable. As to the 2^d, There is not any accessory in this case, and the possession of the servant is the possession of the master.

Twifden justice. To the 2^d, A servant is within the statute.

Wyndham justice accordingly, as to the 2^d, for the reason
aforesaid.

afore
of K
forc
statu
H
vict
T
but
plea
dant
foun

T
freg
And
the
and
whic
not
an ef
Sa
22 F
T
the p
plain
W
Speci
is m
not
denc
K
H
parti
T
factu
case

T
plea

Term. Mich. 15 Car. 2. B. R.

aforesaid. As to the 1st, It is good according to the words of the statute. As to the 3^d, It is only formal.

Kelyng justice. To the 2^d, Here the person enters with force, and then the party ousted shall be restored, and the statute of 31 *Eliz. cap. 11.* shall be taken strictly.

Hide chief justice. Restitution doth not lie without conviction.

Twisden and *Kelyng* justices. Restitution is of duty, but re-restitution is of grace. But after resolved, that the plea was not good, because it is not said that the defendants were in possession three years before the inquisition found, according to *Dyer*.

Guilbert and Martin. Covenant.

THE action is laid in the county of *Hampshire* for not repairing of an house in *Barksbire*; and upon *Non infregit Conventionem*, a verdict was found for the plaintiff: And it was moved in arrest of judgment. And *Guidot* for the plaintiff said, Where the foundation is in one county, and the breach in another, the plaintiff hath election in which county he pleaseth to bring his action; and here is not any mis-trial, because the covenant is transitory, as in an escape.

Sawyer for the defendant; and he cited *Bro. Visne* 19. 22 H. 6. 13. pl. 16. 16 H. 7. 1.

Twisden justice. The deed is now agreed to be where the plaintiff hath alledged it, and therefore good for the plaintiff.

Wyndham justice for the plaintiff. If the issue had been special the trial ought to have been in *Berksbire*; but here is matter general alledged by the defendant, and he doth not * join in a particular issue, and he may give in evidence any collateral thing. * P. 86.

Kelyng for the defendant. The thing in itself is local.

Hide chief justice. It is not a general issue, but upon a particular breach, viz. the repair of the house.

Twisden justice. The general issue here was *Non est factum*. And because two justices were against two, the case was adjourned.

Lee versus Raynes.

THE plaintiff declares, as executor of *Vavisor*, of a promise made thirteen years before: The defendant pleads *Non assumpsit infra sex annos*. The plaintiff replies, that

Term. Mich. 15 Car. 2. B. R.

that he assumed within six years. The defendant rejoins, as before; and issue was joined upon it, and found for the plaintiff. And it was moved in arrest of judgment, because the plaintiff in his replication hath departed from his count. *Cro. Car.* 228. *Tyler against Wats.*

Hide chief justice, *Twisden* and *Wyndham* justices for the plaintiff. Because if the defendant had demurred upon the replication, it had been for the defendant; but here he hath joined issue, and therefore good.

Kelyng justice for the defendant. Because the plaintiff ought to have given an account of the time betwixt the time laid in the count and the replication; but after judgment was given for the plaintiff.

Terry *versus* Hooper & Ux'.

Words.

1 Danv. Abr.

122. p. 6.

168. p. 2.

1 Lev. 115.

1 Keb. 602,

644.

THE plaintiff declares, that he is a lime-burner, and gets his living by buying and selling thereof; and the defendant said of the plaintiff *in arte sua*, John Terry is a runaway, and he is a base cheating rogue, and John Terry shall never think to bring John Webb where he is himself, and rather than so I will spend 20*l.* On not guilty pleaded and found for the plaintiff, it was moved in arrest of judgment, because he doth not say, that the defendant spoke of the trade of lime-burning, but *de arte sua* generally, and he may have another trade.

Jones for the plaintiff. In ancient time it was the constant course in declarations to lay a *Colloquium* of the plaintiff; and it was a grand doubt if it was good without it, until *Cro. Jac.* 673. *Smith* and *Ward's* case. And there resolved *de Quer'* supplies the *Colloquium*, *Cro. Car.* 515. Words of an attorney in his profession. And 2. lime-burner is such a profession of which he may be scandalized.

Wyndham justice. Lime-burning is such a trade of which a man may be scandalized, and so in any lawful occupation whatsoever, for it is his livelihood. 2. The flourish in a declaration are of no effect, but only to aggravate damages. 3. The saying here *De arte sua* are applicable to his profession; and a man may speak occasionally to the prejudice of the plaintiff without having discourse of his profession. As if two are speaking together of another, and a third person comes in and affirms a scandal of him; this is commonly the worst scandal; and therefore judgment for the plaintiff.

Twisden

* P. 87.

Term. Mich. 15 Car. 2. B. R.

Twisden to the same intent.

Kelyng justice for the defendant: That *De arte sua* cannot be applied to his profession of lime-burning.

Hide chief justice for the defendant. Buying and selling is not incident to the art of lime-burning; and he cited a case in *C. B.* 1655, accordingly, and because the court was divided no judgment was given.

Palmer versus Flethees.

THE plaintiff declares for stopping his lights. Special verdict finds that *H.* seised of a piece of ground, and building a messuage upon part of it, he grants the other part of the said ground to *A.* who builds upon it, and obstructs the lights of the first messuage; and if he could, was the single question upon the special verdict. And by *Twisden* and *Wyndham* justices, that he may; but by *Kelyng*, that he may not. *Vid. Cro. Eliz.* 118. *Bury and Pope*, 1 *Leon.* 168. pl. 234.

Case.
3 *Danv. Ab.*
421. p. 7.
1 *Lev.* 122.
1 *Sid.* 167,
227.
1 *Keb.* 533,
625, 704, 836.

Sir Robert Hide, Chief Justice.

Sir Thomas Twisden,

Sir Wadham Wyndham,

Sir John Kelyng,

} Justices.

Sharrock *versus* Bourchier. *Prohibition.*

Prohibition.

THE plaintiff suggests that in the county of *Lincoln* there is a prebend called *Langford* prebend; within the county of *Oxford*; and the prebendaries of that prebend and their farmers have had, time whereof, &c. the granting of the office of commissary within the said prebend of *Langford*, and that Dr. *Pocklington* prebendary there made a lease to *Copley* of this prebend for three lives; and that the lessee grants to the plaintiff the commissaryship; and the defendant pretends that the disposal of this commissaryship belongs to the dean and chapter of *Lincoln*, who had libelled for it in the court of *Arches*, and that the freehold of it would come in question.

Wyndham justice. The prebendary cannot grant this power to make a commissary over to his lessee, no more than he may grant a thing which is annexed to his spiritual function.

Twisden justice. Although it is not grantable, yet the freehold or power to grant is determinable at common law.

Kelyng justice. It may be granted by the prebendary, for it seems to be a peculiar, and that this office runs with the prebend which is demised, and is not an assignment of the spiritual function, and therefore a prohibition lies.

Hide chief justice. The grant of the prebend *cum omnibus advantagiis* doth not pass this power to grant the commissaryship; but it is meerly ecclesiastical. And because the court was divided, no prohibition was granted, but the rule was, That all things stay as before the motion till farther * consideration. But after *Hide* chief justice said, That the right of the office did come in question, and upon that a prohibition was granted. Young

Young *versus* Collet.

AUDITA QUERELA. The plaintiff declares, that whereas *John Collet* in *Hill. 1685.* brought an action of trespass of assault and battery and false imprisonment against him to his damage of 500*l.* and had a verdict for 80*l.* damages, and 4 marks costs, and had judgment. And by an act of parliament held 25 April 12 Car. 2. It is enacted, That all offences, &c. viz. The act of oblivion. And in fact says, that this assault and imprisonment was by virtue of an ordinance for the regulating the excise, and in pursuance of it. The defendant pleads that it was not in pursuance of that ordinance; and found for the plaintiff.

Widdrington serjeant moved in arrest of judgment, that an *Audita Querela* lies not in this case; for it is said by *Stoner 27 E. 3.* that an *Audita Querela* is a new kind of action, and that it commenced only 10 E. 3. and not before. And it doth not lie where there is any other remedy at law for the plaintiff, either by plea or otherwise. And here the plaintiff might have pleaded this ordinance, by virtue of which he justifies the imprisonment in evidence upon the trial, 1655. upon the meal act, and no *Audita Querela* lies where remedy may be had in another manner. 1 *Inst.* 290. b.

Wild serjeant for the plaintiff. The meal act doth not appear to the court, nor can the court take notice of it; and this writ is grounded upon an act of parliament subsequent.

Kelyng justice. The intention of the act of oblivion was to prevent new animosities, but for those things that were reduced to judgment, it was not intended that they should be undone, and therefore an *Audita Querela* doth not lie.

Twisden justice. It seems that the defendant hath waived this exception; but if he had demurred upon the count it had been for him without question.

Wyndham. The act of oblivion is more comprehensive than any course before.

Hide chief justice. The act of oblivion only discharges acts of hostility, and not judgments obtained for such acts. And it was adjourned.

Audita Querela.
1 *Keb.* 264.
556, 634,
640.

Sometimes an *Audita Querela* doth not lie although there be not any other remedy. *Dyer* 203. pl. 75. *Cro Jac* 694. *Alleby and Colley.*

* P. 90.

* Carpenter *versus* Marshal.

Attornment.
 1 Danv. Ab.
 612. G. p. 1.
 612. p. 11.
 1 Lev. 28.
 1 Sid. 189.
 1 Kcb. 643.
 713.

EJECTIONE *firmæ* at the bar, of a lease by *Phillips*, dated the 5th of April 1659. The defendant pleaded Not guilty. The plaintiff made title, that the land in question is dutchy land lying out of the county palatine, and there was a lease for years made of it to *A.* rendering rent, and shews a grant of the reversion the 7th of Jac. to *Ferrers* and *Phillips* under the great seal, county palatine seal and dutchy seal, and that *Phillips* survived, and the rent was constantly paid to him during the lease, which ended in the year 1658. and in the year 1659. *Phillips* made the lease *ut supra*. The defendant shews a patent 8 Car. 1. to him, reciting that former patent to *Ferrers* and *Phillips*, and that it was void, because it passed only an interest in reversion, and no attornment had, and so grants the reversion to the defendant; and this being doubtful whether the former patent were good to pass the estate without attornment, and that upon Co. 4. *Inst.* 209, 210. it was found *specially*; the only question in this case being, Whether attornment was necessary or not in this case.

Jones for the plaintiff. That the grant is good without attornment. 1. Some things are to be premised concerning the three seals here, the seal of the dutchy is pleaded, *Rastal's Entries* 524, and 636. But by the statute of 37 H. 8. cap. 16. Lands lying out of the county palatine shall pass under the dutchy seal. By the common law lands coming to the king in his natural capacity participate of the prerogative, *Plow.* 213. *a.* and *b.* And now it is to see if the statute of 1 H. 4. hath altered this; and it seems it hath not, the words are, That the lands *taliter & tali modo pertractentur*, &c. *sicut pertractari deberent si ad Culmen dignitatis Regie assumpti minime fuissent.* The ends of this statute were, 1. To preserve inheritances. 2. To preserve the reputation: and yet to more purposes the lands partake of the prerogative where the ends are not crossed; as the king within age may grant them: So to have aid, *Plow.* 221. *a.* before issue joined, *Cro. Eliz.* 240. Double usurpation doth not put the king out of possession of a church he hath in the right of his dutchy. As to livery, 21 E. 4. 60. *a.* 26 H. 8. 9. the reason of that is, That it is a privilege adherent to his person, and cannot be separated, as livery, tender of a ring, demand of rent, &c.

1 Leon. 151.
 The lord Howard and the town of Walden's case.

* P. 91.

* 2. If these lands do not pass without attornment, the king will be in a worse condition than a common person, for

for a
 the
 the
 6 Co
 use
 is fa
 this
 not
 har
 mem
 ties
 for
 W
 livery
 books
 ment
 land
 ment
 rie,
 by at
 Kel
 ment
 Tu
 well
 being
 attorn
 judge
 for T
 they
 as we
 dents

I N a
 lib
 an in
 Statut
 Po
 he cit
 in suc
 tion b
 such
 dioces

Term. Hill. 15 & 16 Car. 2. B. R.

for a common person may compel the tenant to attorn, but the king cannot; for a *Quid Juris clamat* doth not lie for the king, because a fine by the king is always by render, 6 Co. 68. a. If a fine be levied to an use, the *Cestuy que use* shall have the rent without attornment, 4 Inst. 210. It is said that the tenant is compellable by English writ; but this only forces the person, and imprisons him, but does not pass the land it self. And as to that that is said, that it hath been used; There cannot be an usagè time without memory, &c. because it begins since 1 H. 4. For authorities in the case, there is Co. 4 Inst. 209. and so concluded for the plaintiff.

Weslon for the defendant. Attornment is as necessary as livery, and no difference betwixt them; and so are the books 21 E. 4. 60. 26 H. 8. 9. The reasons of attornment are, 1. Notoriety. 2. Election of the tenant of his landlord, *Moor* 153. In *Bonnie's* case; by *Beaumont* attornment ought to be: And the statute of 2 & 3 Phil. & Maria, cap. 20. saith, That the lands there annexed shall pass by attornment, &c.

Kelyng justice. No difference betwixt livery and attornment in this case.

Twisden. *Coke*, when he delivers the opinion in 1 Inst. well knew how these lands should pass out of the crown, being attorney general; and it is the constant course that no attornment shall be adjoined. But afterwards it was adjudged for the plaintiff, for they were guided by precedents; for *Twisden* and *Wyndham* said, That if it were *res integra* they could not find any reason why attornment should not be as well as livery upon a feoffment; but because the precedents are contrary, judgment was given for the plaintiff.

Ford versus Welden.

IN a prohibition the plaintiff suggests, that the defendant libelled for defamation in the court of Arches, and he is an inhabitant within the diocese of London, *contra formam Statuti* 23 H. 8. cap. 9. Ordinary. 1 Keb. 638. 647, 651, 669.

Powis for the defendant, That a prohibition shall not go; he cited *Cro. Car.* 339. *Gobbet's* case, where a prohibition in such case was denied, because there had been a composition betwixt the bishop of London and the archbishop, for such a jurisdiction; and the archbishop doth not visit in the diocese of London for that cause. P. 90

Kelyng

Term. Hill. 15 & 16 Car. 2. B. R.

Kelyng justice. The diocese of *London* is not within the jurisdiction of the *Arches*, but the archbishop hath a peculiar jurisdiction there, consisting of 14 parishes, *Co. 13 Rep. 4.* and the mischief here was intended to be prevented by the statute; and so is *Mich. 5 Car. 1. Cro. Car. 162. Cadwalder versus Bryan, Hob. 185. Jones versus Jones;* and therefore a prohibition lies.

Wyndham. A prohibition doth not lie, because the *Arches* is within the diocese of *London*; and if there be any cause to remit the jurisdiction of the bishop of *London* to the *Arches*, it ought to be determined by the civilians, according to the statute; and the composition mentioned in *Gobbet's* case amounts to a licence.

Twisden justice. A prohibition lies. Although there was a composition before, yet now the statute takes it away, and the agreement betwixt the ordinaries cannot prejudice the people for whom the statute was made; and as to *Gobbet's* case, the reason there is not good, for the bishop of *London* cannot agree that the archbishop shall not visit; and 2dly, The composition intended ought to be pleaded.

Hide chief justice. A prohibition doth not lie; and he affirmed that such writ is *ex gratia*, and not *ex debito Justitiæ*; but *Kelyng* and *Twisden* positively denied that; and because the court was divided the matter rested as before.

Townsend's Case.

Mandamus.
Antea 69.
1 Lev. 91.
1 Sid. 107.
1 Keb. 458,
470; 659.

THE mayor and commonalty of *Oxford* return to a *Mandamus* to them directed, That if any person binds himself to be an apprentice, it is by the course of their corporation to be inrolled, and that the said *Townsend* by indenture obliged himself to be an apprentice to one *Colley*, by which he covenanted that he would not contract matrimony during his apprenticeship, and that the said indenture was inrolled according to the said usage; and that the said *Townsend* within the first two years of his apprenticeship did marry, and after this he served rather as a journeyman than an apprentice. And to this return *Holloway* took exceptions; 1. Although he covenants that he will not marry, yet if he marry, this is only a breach of his covenant, but not any cause to bar him of his freedom. 2. The return that he * served rather as a journeyman than as an apprentice is uncertain and not positive; and for this cause the writ of restitution was awarded.

* P. 93.

Sands's

Term. Hill. 15 & 16 Car. 2. B. R.

Sands's Case.

THE eldest son of Sir George Sands having a wife dies intestate, and administration is granted by the prerogative court to Sir George Sands as the next of kin; and now the wife libels in the ecclesiastical court to repeal these letters of administration, and to grant them to her; and Sir George upon this moves for a prohibition; and the court granted it; and resolved by the statute of 21 H. 8. it is in the election of the ordinary to grant administration to the wife, or to the next of blood. 2. The father is next of blood; and the case of my lord Brook cited in Ratcliff's case is not law. 3. When the ordinary hath once granted administration, he cannot repeal that, and grant it to another, because he hath executed his power. *Cro. Car.* 49. *Fatherbie's case.*

Administration.
3 Danv. Abr.
407. p. 1.
1 Sid. 179.
403.
1 Keb. 667,
683.
3 Salk. 22.

Keys versus Braydon. Error in Ireland, Ejectionment.

THE plaintiff obtains a judgment against his own ejector, in a case where an infant was in possession; and the party concerned in the land brings a writ of error in the name of the feigned defendant. The plaintiff pleads in the writ of error the release of the defendant; and the court held such release shall not be allowed. And the court will not permit the party to proceed to try the issue if the release be good or not, because it is to bar the right of a third person.

Error.
1 Keb. 705,
740. 755.

And *Hide* chief justice said, That such release was offered in *C. B.* in a case between the lord *Leceister* and the lady *Holburn*, and the court of *C. B.* refused to allow it.

* *Hurst's Case.*

* P. 94.

A MANDAMUS was granted in the case of *Hurst* to restore him to the place of an attorney in the town-court of *Canterbury*, and upon the return of the writ, re-stitution was granted, because an attorney is not such an office of which the commissioners for corporations have a power to intermeddle.

Mandamus.
Antea 56.
1 Lev. 75.
1 Sid. 94,
152.
1 Keb. 349,
354, 387, 52
675.

Morgan

Morgan *versus* Man,

Award.
1 Lev. 127.
1 Sid. 180.
1 Keb. 678.

DEBT on an obligation. The defendant demands oyer of the condition, which is to perform an award; and then pleads *Nulhum fecer' Arbitrium*. The plaintiff replies, and sets forth the award, and assigns breach for non-payment of the money. The defendant rejoins, That one *Anne Collins* the testatrix of the plaintiff recovered against him on a judgment in an action of battery and false imprisonment, and this judgment was one of the causes submitted, and the arbitrators had notice of it, and they did nothing concerning it. The plaintiff surrejoins, That the award was as well concerning that judgment as of other things betwixt them; *Et hoc paratus est verificare*. The defendant demurs; and *Jones* for the defendant, Here the plaintiff ought to have concluded to the country, and not to have said, *Et hoc paratus est verificare*, for here is an affirmative and a negative, which make a good issue, which may be tried.

Wild serjeant for the plaintiff. 1. This is aided upon a general demurrer, because only matter of form. 2dly, Here is a departure, because the defendant cannot rejoin concerning an award, when he hath pleaded before that there was no award; and upon debate it was resolved, This is a departure, and therefore adjudged for the plaintiff; but the saying, *Et hoc paratus est verificare*, where he ought to have concluded to the country, is matter of substance; but for the departure judgment was given for the plaintiff.

* P. 95.

* Wilks *versus* Ruffel.

Prohibition.

IT was moved for a prohibition to the spiritual court. The plaintiff suggests, that the defendant sued him being executor, for tithes, and to have double damages, which doth not lie against an executor.

Kelyng justice. If by the common law an executor shall not be charged, if the spiritual court will sue him; there a prohibition lies, because it exposes the executor to a *Devastavit*; but the reason of *Kelyng* was disallowed, and a prohibition was denied. *Vide Fitzherbert's Nat. Br. 51. Roll, 1 Part, 919.*

Term:

The Judges being

Sir Robert Hide Chief Justice,
 Sir Thomas Twisden,
 Sir Wadham Wyndham, } Justices,
 Sir John Kelyng,

Memorandum, This term died Sir Thomas Widdrington Serjeant at Law, who was of Gray's Inn, and by birth, of the county of Northumberland.

Theodorus Humfrys one of the clerks of Mr. Paget, *Custos Brevium* of this court, complained of the said Paget for hindering him to take Clerks Fees due to him for transcribing Records of *Nisi Prius* for the Western Circuit; And the Court ordered Paget to refund upon Account, or else to be committed.

It is a Rule of this Court, That if Bail be put in before a Judge, the Plaintiff hath twenty days to accept or disallow of it, and after that to file it under the pain of ten Shillings.

Wynne *versus* Lloyd,

JONES for the defendant. A vouchee may appear in Error. person, *Fitz. Voucher* 230. and he may come in by attorney *gratis* without a summons *ad Warrantizandum*, *Trin.* 22 E. 3. 7. b. pl. 2. *Fitzh. Voucher* 197. *Trin.* 13 H. 7. 24. pl. 1. A caption before the time that it ought to be taken, is good enough. *Hutt.* 135. *Champernoon's* case. And afterwards judgment was affirmed by all the judges, because it was resolved a good warrant of attorney. *Poff.*

Bowman

Term. Trin. 16 Car. 2. B. R.

* P. 97.

* Bowman *versus* Milbanke.

Devise.

2 Danv. Abr.

527. p. 16.

Eq. Ab. 207.

p. 1. 1 Lev. 130. 1 Sid. 191. 1 Keb. 719.

UPON a special verdict found, &c. (*viz.*) *I give all to my mother, all to my mother*; and resolved lands do not pass by these words, by the whole court.

Brocket in ringing was taken up by the bell-rope, and by it he was killed; and now the coroner took an inquisition upon his death, and found the bell to be a *Deodand*. And *Siderfin* for the church-wardens moved, That the bell is not to be a *Deodand*, because a bell is already given to God and to the church. And bells were invented about the year of our Lord 400. by *Paulinus* a bishop here; and by *Hide* chief justice, the case of *Fitzh. Corone* 389. of a mill-wheel, is not law. And it was adjourned. *Vide Stamf. Placit. Corone, lib. 1. cap. 12. fol. 20. a. Fitz. Corone* 405.

* P. 98.

* Term. Trin. 16 Car. 2. B. R.

Charleton *versus* Finney.

Pleading.

1 Sid. 215.

1 Keb. 759.

766.

Dyer 121. a.

pl. 14.

3 Leon. 90.

129. Bunny

versus Bunny.

2 Roll. Rep.

63. Gray

versus Gray.

IN debt upon an obligation, the condition was, That if he paid all sums which should be expended about, &c. that then, &c. The defendant pleads that he paid all. The plaintiff replies he had not paid all; & *hoc paratus est verificare*. The defendant demurs generally, and alledged for the defendant, That the plaintiff ought to have concluded to the country in his replication, because there is a affirmative and an negative; for otherwise there shall never be an end of pleading, but it shall be infinite; and so is *Cro. Car.* 164. *Duncomb versus Smith*, and *Yelo.* 137. *Alexander versus Lane*. And of this opinion was all the court. And *Twisden* put a difference when the plea is involved, and when it is direct.

Leach

Term. Trin. 16 Car. 2. B. R.

Leech and five others being of the jury at *Justice-Hall* Jurors. in the *Old-Baily* this last sessions, refused to find certain Quakers guilty according to their evidence, and upon this they were bound to appear here this first day of the term, and they appeared accordingly, and the court directed an information to be drawn against them, and upon that they were fined. *Vide* the same case, 3 *Leon.* 147. *Vide postea* 138. The King against *Wagstaff*.

Note; 1 *H.* 8. It was laid to *Empson's* charge, That he being recorder of *Coventry*, and there sat with the mayor and other justices of the peace upon a special gaol-delivery within that city, on the *Monday* before the feast of *St. Thomas* the apostle, 16 *H.* 7. A prisoner that had been indicted of felony, for taking out of a house in that city certain goods to the value of 20*s.* was arraigned before them, and because the jury would not find the said prisoner guilty for want of sufficient evidence (as they after alledged) the said Sir *Richard Empson* supposing the same evidence * to be sufficient, caused them to be committed to ward, * P. 99, wherein they remained four days together, till they were contented to enter into bond in 40*l.* a-piece to appear before the king and council 15 *Hill.* whereupon they keeping their day, and appearing before the said Sir *Richard Empson* and other of the king's council according to their bonds, were adjudged to pay every of them 8*l.* for a fine, and accordingly made payment thereof, as they were then thought worthy so to do. But after at a sessions holden at *Coventry* 1 *H.* 8. an indictment was framed against him for this matter, and thereof was found guilty, as if therein he had committed some great and heinous offence against the king's peace, his crown and dignity. *Hollinsbed*, part 2. in the time of 1 *H.* 8. fol. 804. and fol. 1104. in the case of Sir *Nicholas Throckmorton*, 1 *Mar.*

Note; Before *Westm.* 2. cap. 30. Some justices are said to rule over the recognitors of assize, and made them give a precise verdict without finding the special matter. 2 *Inst.* 422.

Term. :

Adams *versus* Tomlinson.

Debt.
2 Danv. Ab.
499. p. 9.
1 Lev. 153.
1 Sid. 236.
1 Keb. 827.

JUDGMENT was given for the plaintiff in *B. R.* upon which the defendant brought a writ of error in the Exchequer-chamber, and after the writ of error brought, the plaintiff in the first action brings an action of debt upon the judgment, to which the defendant pleads *Nul tiel Record*. And resolved the plea is naught; for notwithstanding such a writ of error an action of debt lies upon the judgment, as *Dyer* 32. b. pl. 5. and 6. and 18 E. 4. 7. But *Bendl.* 20. pl. 31. takes this difference, That when the action of debt is brought before the writ of error, the action continues good. But if the writ of error is first brought, debt does not lie; but in *Limby* and *Langham's* case the judges held it was all one, and that a writ of error is not any *Superfedeas* to an action of debt; and that notwithstanding the writ of error, the bail may bring in the principal in discharge of the mainpernors.

Clerk *versus* Molineux.

Escape.
3 Danv. Ab.
117. p. 8.
1 Lev. 159.
1 Sid. 269.
1 Keb. 845.

IN an action upon the case for an escape against the sheriff of *Nottingham*. The defendant pleaded, That during the time the prisoner was in his custody he received a writ of privilege from the marquess of *Newcastle*, reciting that he was a justice of peace of the said county, and *Custos Rotulorum*, and that the said prisoner was convened before the justices at the quarter-sessions, and that by the law of *England* the prisoner ought not to be molested *cundo & redeundo* during the time that he had causes there depending, and commanded the sheriff to dismiss him, which the defendant accordingly did. To this plea the plaintiff demurred; and it seemed an ill plea, because the justices can't cause an arrested person to be dismissed. *Vide Browl.* 1. 1. 15. *Wilsons* against the sheriffs of *London*, where the court held, that if a man was arrested in the face of the court, the court had power to discharge him, but not otherwise.

Patrick's Case.

A WRIT of *Mandamus* was directed out of the King's Bench to *Richard Bryan*, the senior fellow of *Queen's College* in *Cambridge*, to admit and pronounce *Simon Patrick* president of the said college, being *Debito modo electus* president, or to shew cause to the contrary. After an *Alias* and *Pluries* *Richard Bryan* makes this return: viz. That king *H. 6. 30 Martii 26th* of his reign, by letters patent under his great seal of *England*, gave licence to *Margaret* queen of *England* his consort, that she might found a college to consist of one president and four fellows (more or less, as the revenues of the said college should happen to fall out) in the university of *Cambridge*, and ascertain the place *ad studendum & orandum*. Which president and fellows for the time being, according to such statutes as the bishop of *Coventry*, *John Somerseth* chancellor of the Exchequer, and others whilst they lived, or the greater part of them should live, should make, should be governed, punished and deprived. That *Andrew Ducket* should be the first president, and names the other four fellows, clerks. That the said president and four fellows may afterwards admit more fellows. That the name of the college shall be *Reginale Collegium Sanctæ Margaretæ & Sancti Bernardi in Universitate Cambrigiæ*. That *15 April 26 H. 6. Margaret* founded the college accordingly, and made the said *Ducket* president, and the other four fellows, and that they might choose others. The bishop of *Coventry*, *Somerseth* and the others before appointed, make and ordain statutes and orders; amongst which they ordain, 1. That the college be called *Queen's College*, and that in the same be one president, whom all others in *omnibus licitis & honestis* must obey. That there be nineteen fellows, whereof every one must take holy orders within two years after they become masters of art, unless the president and greater part of the fellows shall give them longer time. 2. That none of the fellows sow discord, and if any be found so doing, they injoin the first time admonition by the president or his deputy; the second time by the president and two fellows; the third time expulsion. And if * discord arise between the president and the fellows, or any of them, the president must call the fellows together three several times in three days space; and if they cannot compose the differences, then as well the president as the fellows are bound to stand to the award of

Mandamus.
1 Lev. 65.
1 Sid. 346.
1 Keb. 289,
294, 298, 551,
610, 665, 835.
1 Keb. 65,
164, 259.
Hollingshead
fol. 765. l. 2.
dit que le feme
de E. 4. erect
cest College.

Term. Hill. 16 & 17 Car. 2. B. R.

of the chancellor, and the greater part of the *præpositi* of the colleges, under pain of expulsion. That king *James 9 Martii 3 Jac.* confirmed all former charters and grants to the university and scholars of the same. And farther, that the chancellor of the said university for the time being (if within the town or suburbs) or in his absence, the vice-chancellor, *per Cancellarium Universitatis prædictæ in ea parte deputat^s sive appunctuat^s*, should be ordinary visitor (where no special visitor was nor should be otherwise appointed) of all colleges and halls in the said university. That no special visitor is appointed of this college. That *Dr. Edward Martin* late president died 7 April 14 Car. 2. and that ever since *Edward* earl of *Manchester* hath been chancellor, and out of the town of *Cambridge* and suburbs thereof. That *Dr. Dillingham* is his vice-chancellor. That the town and university of *Cambridge* are within the diocese of the bishop of *Ely*. That at the death of *Dr. Martin*, and ever since, *Mathew Wren* was and hath been bishop of *Ely*. That *Simon Patrick* hath not made his appeal to the chancellor, vice-chancellor or bishop, and therefore he the said *Richard Bryant* cannot admit or pronounce the said *Simon Patrick* president.

Masters pro Patrick. I conceive the return to be insufficient, and the statutes of the college recited are not material, and the letters patent are not well applied. 1. It is said *That the college is within the diocese of the bishop of Ely*; but it is not said, *That it is within the jurisdiction of the bishop*; and it may be within a peculiar of the diocese, in which the bishop hath nothing to do. 1. A college is a temporal corporation, *Coke sur Litt. 250. a. Dyer 255. b. Finch. 92.* 2. A college is temporal, *viz. To pronounce him president. Dyer 209.* Deprivation is a temporal act, *Et contrariorum eadem est ratio.* And it is not requisite that the president be in orders. 44 *Aff. 9.*

Object. This college is founded *ad studendum & orandum*, which implies that it is spiritual.

Resp. Coke sur Lit. 342. a. An hospital, though founded *ad orandum*, is lay, for every one is bound to pray; and *ad studendum* doth not refer to divinity. And the fellows here are to enter into orders, but it doth not here appear that the fellows are in orders.

* P. 103.

* *Object.* An impropriation cannot be to a lay corporation, but it may be to a college.

Resp. It may be to a nunnery, *Plowd.* and yet that is no spiritual corporation. And this court is the proper place for redress and examination of this matter, because other-

wile

wife here would be a failer of justice. *Co. Inst.* 4. 71. And here can be no prejudice to any one by allowing a *Mandamus*; for notwithstanding such a writ, the party grieved may try his right, viz. the party whom the feignior fellow hath already admitted president.

Authorities in the case are these; *Fitz. Affise* 150. 8 E. 3. 69. 9 H. 6. 32. *Dyer* 209. 6 H. 7. 14. In the case of a free chapel. So in case of the granting of letters of administration, *Luskin versus Carver*, *Stile's Rep.* And in case of the utter of a grammar school, *Crayford's case*; and so prays a *Mandamus*.

Brampston contra. This college being founded for a spiritual end is a spiritual corporation, *Linwood* 111, & 155. The orders of the *Carthusians*. 8 *Aff. pl.* 29 & 31. L. 5 E. 4. 127. and *Allen and Nasbe's case*.

Jones pro Patrick. This return is insufficient, because it doth not contain an answer to the writ; for the return says that Mr. *Patrick* hath not appealed; but shews no cause he should appeal, 34 H. 6. 41. but in truth, the return is to the jurisdiction of the court. I shall consider the return in two points, 1. As without reference to the letters patent, and 2. What influence the letters patent have upon the same.

As to the 1st, The king gives licence to the queen to erect a college *ad studendum & orandum*, and no visitor is appointed; and whether there be any remedy in this court to restrain a grievance, is the question. This court hath jurisdiction to restrain and take cognizance of all misdemeanors extrajudicial. *Co.* 11. 98. *Bagg's case*. 1. If there be no remedy for this here, there is remedy no where.

Object. Mr. *Patrick* ought to appeal to the visitor.

Resp. It doth not appear by this return that there is any visitor. And 1. The foundation doth not appoint any visitor. And 2. The law doth not appoint the founder to be visitor; and if it did, queen *Margaret* the foundress here was a foreigner and died without issue: And we shall not intend any visitor when 'tis not mentioned, because a return ought to be certain, and is not to be construed by intendment, for the party cannot reply to it.

* *Object.* The ordinary of the diocese is visitor.

* P. 104.

Resp. 1. There is no authority in our law for that, in case of a college. 2. The experience in the university is totally against it; for the bishop appoints visitors, but not the bishop of the diocese. 3. When the letters patent recited in the return were made, the law was not so taken, for 'tis added as a supplement, who shall visit. 4. The nature

Term. Hill. 16 & 17 Car. 2. B. R.

nature of this corporation doth not allow the bishop to be visitor; for I take it for a rule, that where the head of the corporation is constituted without the concurrence of the ordinary, there the ordinary hath no jurisdiction, be the corporation spiritual or temporal. 1. For a spiritual corporation, as an hospital. *F. N. B. 42. b. 50. p.* In case of a free chapel the ordinary shall proceed *per pœnam corporalem & non pecuniariam*. The king's chaplain may be visited as a private person, but not in his politick capacity. *6 H. 7. 7.* He cannot visit a chaplain, because he comes not in by his act. In case of a dean, *in temps Ed. 6. Br. Præmunire 21.* In case of an abbot, *9 H. 6. 32.* If he comes in by election without the concurrence of the ordinary. 2. For a temporal corporation, it is plain; and here this college is not a spiritual corporation, because neither the persons nor employment are spiritual. The president is not to be in orders; the employment *ad studendum & orandum*; all learning; *ad orandum*. So must all lay professions, hospitals, a private school, a workhouse is *ad operandum & orandum*. It is the duty of every one.

As to the 2d, Let us consider what influences the letters patent have in this case; I conceive they alter not the use.

1. Here are no restrictive or negative words, as to the jurisdiction, as in act of parliament, or as in the grant of consuance of pleas, *Leo Quod nullus Justiciarius se intrumittat.* 2. It doth not appear that there was any visitor at the time of the return. The vice-chancellor ought to be thereunto appointed, and he doth not visit *quatenus vice-chancellor*.

Obje. A presidentship of a college is not an office of a publick nature.

Resp. *Bagg's* case is, that this court hath consuance of all wrongs, be they private or publick. 2. But then is of a publick nature more than the petty corporations in Cornwall, or any petty borough.

And for authorities, there was no precedent for *Bagg's* case; but the judges finding the mischief, did out of the foundation of law frame that writ; and here the president cannot have an assise, and therefore ought to have this writ.

* P. 106. * *Finch* solicitor general *contra*. I agree the power of this court to be very great, and *Bagg's* case taken *cum grano salis* is good law. But in all cases where the foundation of a corporation is eleemosynary (be it lay or spiritual) the ordinary is visitor thereof. *Linwood cap. de Religiosis Domibus Verbo Ordinarius. Locus pius non potest fundari eo modo quod non possit Episcopus se intrumittere.* And if the ordinary is not,

Term. Hill. 16 & 17 Car. 2. B. R.

not, then the founder is visitor; and if neither, then the king, as fountain of authority; and if so, then the king grants this authority by his letters patent. A man cannot resort to this court, but either it must be *per saltum* or *per gradus*, *Hob. 23.* Dr. James's case, and Kenne's case. Deprivation is not questionable here, and 13 Jac. Huntley's case. The consequence is great. Where the founder names a visitor and prohibits appeals from him, yet an appeal from the visitor is not restrained. *Magdalen college in Oxford* is so founded, *Absque ullo Appellationis remedio*; and resolved inter Dr. Pierce and Dr. Yarbury, such clause doth not restrain an appeal from the visitor; although it was there objected, that he might come into this court, but resolved he ought to resort to the visitor, and the words are contrary to common right. See the clause of *Omni appellatione remota*, *Co. Inst. 4. 340.*

Raymond pro Patrick. I shall waive the exceptions to the form of the return, which is at the best but argumentative; and out of which the consequence intended cannot without much uncertainty be deduced, to wit, That the college is within the jurisdiction of the bishop of *Ely*, therefore not within the jurisdiction of this court of *B. R.* For a man in some cases may have redress in both jurisdictions *F. N. B. 51. b.* He may sue here and there for a pension; and that it is within the diocese of the bishop, therefore it must be within the jurisdiction, whereas it may be within some peculiar. Such a return by a sheriff hath been resolved naught, as *Plowd. 14. a. Manxel's case.* In *Habere facias seisinam* the sheriff returns, that another is tenant of the land, and so he cannot give possession without trespass, it is no good return. But I shall waive these exceptions, and speak only to the main point intended in the return, which is this, That this college is within the jurisdiction of the bishop of *Ely*, who is proper ordinary, and that Mr. *Patrick* ought to apply himself to the bishop and not to this court, which in short is, That the bishop of the diocese, where no special visitor is appointed, is *de communi jure* visitor of colleges in the universities. In examining of which point, as to our case, • I shall humbly crave leave to premise three * P. 106. things, which I conceive will be granted me on the other side, for they are very plain.

1. Upon the whole record, upon view of the writ and of the return thereof together, it doth most plainly appear to the court, that the plaintiff Mr. *Patrick* is greatly injured, and that by the defendant Mr. *Bryan*, and so deserves no more favour than a *Tort-feasor*; for the plaintiff by the writ

H

suggests,

suggests, *Quod debito modo electus fuit Præsident ejusdem Collegii, & in locum Præsidentis Collegii prædicti, admitti se obtulerit*; and that notwithstanding, *Richard Bryan* the defendant being seignior fellow, & *cui pertinet Præsidentem sic electum pronunciare, & personam sic electam admittere, & facere electum Præsidentem jurari & coram communitate Collegii in Capella ejusdem ad mensam Domini personaliter præsentari, prædictum* the plaintiff in *Præsidentem* admittere renuit. The defendant returns, The foundation of the college, and some certain statutes (so many as he thinks make for his turn) the letters patent, and that the college is within the diocese of the bishop of *Ely, &c.* and so he cannot admit him; but not one word that the plaintiff was not duly elected, nor that *Mr. Bryan* is not the person that hinders the plaintiff's admittance, both which by silence are agreed unto by *Mr. Bryan*; but that the plaintiff hath not taken a right course.

2. That the letters patent as to the matter in question are of no concernment: 1. Because they are not restrictive, so as none other shall visit but the chancellor or vice-chancellor. 2. Because the vice-chancellor must be *in ea parte deputatus sive appunctuatus*, which is not here alledged to be done: So that they make nothing in this case, and this being observed already, I shall speak no more to them.

3. That (contrary to what hath been by the way alledged, but not proved on the other side) every eleemosynary foundation is not visitable by the ordinary; 'tis said, 8 *Aff. pl. 31*. That the ordinary shall not visit but where he hath institution and induction; and with that agrees the opinion of *Keble, Hill. 6 H. 7. 14. pl. 2*. But admit that the ordinary may visit where he hath not induction, yet his power shall not extend to all eleemosynary foundations; for *Regist. Orig. 35. a.* A prohibition is to an officer of the court of *Canterbury* and his commissary for the holding plea concerning the grammar school of *Fernedon*, in a suit between the abbot and convent of *Battel* and *William Pipod*, * P. 107. *Regist. 41. a.* Another prohibition * to the archdeacon of *Taunton* for holding plea concerning an hospital, and yet nothing can be more eleemosynary than schools and hospitals. And could the ordinary by the common law have visited all foundations eleemosynary, the statute of 2 *H. 5. cap. 1* had been to no purpose, which doth enable the ordinary to correct the abuse of lay-hospitals erected for the purposes therein mentioned. So that I do conceive, as it is of hospitals, so of all other eleemosynary foundations, and without special visitors. 8 *Aff. pl. 29.* and *Coke l. 10.*

31. a. If the hospital be spiritual, the bishop shall visit; if lay, the patron: for so the writ in the *Register* before cited is, fol. 41. *Totum in temporalibus fundatum existit.* And the statute *De circumspecte agatis*, 13 E. 1. *Episcopus teneat placitum in Curia Christianitatis de iis quæ mere sunt spiritualia.* And *Linwood* 53. expounding what are *Merè Spiritualia*, says, *Quæ non habent mixturam temporalium.* And if there be no visitors specially appointed, then in common reason, and according to the rule of law, *Ne deficeret Justitia*, the king. So that now, whether this college upon the whole record be of a lay or spiritual foundation, is the question: for if it be spiritual, then I must acknowledge the bishop of *Ely* (admitting the court shall intend its being within the compass of his diocese to be within his jurisdiction) in all things spiritual ought to visit; but if it prove a lay corporation, then I conceive the king is to visit, for no founder appears, *Ne Curie Regis deficerent in Justitia exhibenda*, *Co. Inst.* 4. 213. And I do conceive this college, as it is here described, to be of a temporal and lay foundation. In the proof whereof I shall make no difference between it and other colleges of the universities; for if any difference, it will be on my side, the foundations of other colleges being more spiritual than this.

1. From the end and purpose of its foundation, viz. *Ad studendum & orandum.* 1. *Ad studendum*, which may be, and by experience we see hath always been humane learning principally, viz. logick, philosophy, mathematicks, &c. And the constant practice founded upon the opinions of learned men concomitant with practice. *Camden* in his *Britannia* 381. describing the university of *Oxford*, says, That the places of learning were in old time called *Studia*, for that they were designed *pro bonarum literarum studiosis*; and in his description of *Cambridge*, having repeated all the colleges in that university, amongst which he names this of *Queen's*, speaking in commendation of this university, *I will*, says he, * *let pass litt'e monasteries and religious houses.* * P. 108. So that he makes a plain distinction between the colleges in the university and religious houses. And *Stow* in reckoning up all the colleges of both universities and their foundations, fol. 450, &c. shewing some originally founded for grammar, others for logick, others for other sciences, reckons none of them barely for ecclesiastical matters. *Linwood* 155. *K. Cap. De Magistris*, says, A college is only *Habitaculum Scholarium*; and 161. *Cap. De Hereticis, Verb. Ipsius loci*, where treating of the jurisdiction of the ordinary in punishing hereticks, puts this question: What if the place be

Term. Hill. 16 & 17 Car. 2. B. R.

Non habens Ecclesiam Parochialem, qui est locus Religiosus, vel Collegium, aliufve locus qui non subest Ecclesiæ Parochiali? So that Collegium (which I take to be in the university) is a place distinct from *Locus Religiosus*. And in truth, if we observe the foundation of all religious and ecclesiastical corporations and societies, not one was ever seen whose end was *Ad studendum*. Their design was either to pray *pro animabus*, or to observe such and such canonical hours, according to such and such an order, their matins, vespers, compline and other divine offices tending to divine worship, which was already by the church prepared to their hands, and such as men of little or no learning might perform. They might contemplate upon what was already invented and studied, and agreed on to their hands, but not excogitate new matters in religion. They went on in a circle, and where they left off at night, they began the next morning. They were not enjoined *Ad studendum*, but *Ad celebrandum divina*. True it is, some members of such foundations have been students, and have profited in arts, and have written learned tracts, but they were not enjoined to do so; for 'tis not study, but *Celebratio divinorum* makes an ecclesiastical corporation. For suppose a man should erect a society, and direct that it should be to study the schoolmen or the fathers, to enable them in the polemical parts of theology, or to paraphrase or make a comment upon the bible, as the *Schola Conimbricensis* did upon *Aristotle*, this would not be a spiritual corporation; for that the spirituality consists in *celebrando divina & fungendo divinis officiis*, and not in *studendo*. 2. *Ad orandum* is no more than what is implied, for with all studies that must be concomitant. A lawyer by the lord Coke's rule of *Quatuor orabis* may be as well an ecclesiastical person, if *Ad orandum* should make him ecclesiastical. I may say of this word *Ad orandum*, as Lind-

* P. 109. wood expounds the words * of *Circumspecte agatis, De mortali peccato*. 1. says he, *Non intelligas de omni peccato mortali, sed de tali cujus punitio de sui naturâ spectat ad forum Ecclesiasticum*; for if the church should take consufance *de ratione cujuslibet peccati mortalis periret temporalis gladii jurisdictione*, for that every evil act would have something of mortal sin in it. So if the injunction of saying one's prayers would make a corporation spiritual, none almost of those, which are out of doubt lay hospitals, but in their creation would be spiritual. Nay in *Pit's* and *James's* case, *Hob. 121*. Prayer for souls was enjoined, and yet the hospital was lay. And denomination is from the greater part of the imployment, viz. If it be to celebrate in *Ecclesiasticis*, 'tis that

Term. Hill. 16 & 17 Car. 2. B. R.

that makes an ecclesiastical person. They were *Divino mancipio servitio*, and did *Deo servire*. As to the objection, that the fellows are here enjoined to be in orders, it hath been answered: 1. The president is not enjoined. 2. They may be dispensed with amongst themselves.

2. From the use. 1. How they are used in the commonwealth. 2. What acts they do not compatible with a spiritual corporation. To the 1st, 8 *Aff. pl.* 29. A spiritual corporation is not chargeable with subsidies, nor taxed amongst the laity. Now a college in the university is so taxed in every act for subsidy, as we may see 21 *Jac.* 3 *Car.* 1. and the last act for subsidies, 15 *Car.* 2. only there is a proviso to dispense with their payment. 2. The university sends burgesses to the parliament, which they could not do if they were a spiritual corporation, *Et eadem est ratio partis & totius*, if the whole be lay, the essential parts cannot be spiritual.

3. From their constant application to the temporal power upon all occasions of grievances amongst them, and the balking the bishop of the diocese. *Linwood fol.* 155. *cap. De Magistris*. When books of *Wickliff* were spread abroad, and others pretended to expound the scriptures, a canon was made, that none should do so, but by licence from twelve of either of the universities, to be allowed by the archbishop of *Canterbury*, not the bishop of *Ely*, or of the diocese. 5 *E.* 2. *M.* 8. *Riley* 533. One *Roger Baketon* having a desire to take his degree in the university, was denied, and thereupon he brought his *Mandamus* directed to the chancellor and masters of the university. *Teste Rege* 28 *die Martii al York.* *Riley* 534. In the same year the university thought themselves so far from being a spiritual corporation,* that they excluded certain scholars who were of the order of the predicants, and denied them any privilege of the university, and thereupon these scholars (waiving the bishop of the diocese) apply themselves to the king, and obtain a *Mandamus* directed to the chancellor, *Regentibus & non Regentibus* of the university, commanding them to allow the complainants the privileges by them challenged. *Teste Rege*, 29 *Martii* 6 *E.* 1. *Co.* 2 *Inst.* 640. *Rex non intro-mittit se de his quæ spectant ad forum Ecclesiasticum, prosequatur coram Ordinario jus suum.* *Riley* 601. *Claus.* 19 *R.* 2. *M.* 24. *Robert Lichlade*, a scholar in *Oxford* for maintaining lolarity was complained of, and the university was remiss in punishing him; the bishop takes not upon him jurisdiction though in a cause of heresy, but the king directs his writ to the chancellor of the university to remove him:

In

Roy poet create Doctors in Divinity. *Seld.* tit. Hon. l. 2. c. 1. pag. 394. Count Palatine poet is not fair.

* P. 110.

Teste Rege, 18 *Julii.*

Term. Hill. 16 & 17 Car. 2. B. R.

In which writ the words are very remarkable, That this *Lichlade* did *publicare, communicare & docere opiniones nefarias, ac conclusiones detestabiles in fidei Catholicae laesione, & Universitatis prae dictae subversionem, nisi brachio Regiae Majestatis* (not the visitation of the ordinary) *citius resfiatur*; and then commands that they shall examine *per Inquisitionem vel alio modo legitimo si ipsum talem inveniri contigerit: Per Inquisitionem* according to the common law, and not by ecclesiastical process. 50 E. 3. pars 2. membrana 8. *John Wolverton's* case. A *Mandamus* to restore a fellow in *Cambridge*, who was turned out of the university; and *F. Corody* 6. the very sending the writ shewed a right to the jurisdiction till the contrary be shewed. 21 E. 1. C. B. Rot. 318. *March* 181. *Habeas Corpus* for a scholar imprisoned by the vice-chancellor, no application to the bishop which had been proper, if oppressed by false accusation for heresy, &c. All which precedents shew that the colleges were of temporal consueance; or at least not subject to the visitation of the ordinary. 5 Mar. A commission issued to visit the university of *Cambridge*, amongst which visitors were some bishops, viz. *Chester* and *Chichester*, but the bishop of *Ely* was none. The letters patent in the return do imply that the bishop had nothing to do with this matter.

M. 34 H. 6.
14. b. pl. 27.
Expresse in le
point que
poet.

I will not repeat the answers which have been made to the objections, as 1st, That an impropriation may be to a college, which 1st, hath not been resolved; for none have so been. All the impropriations they now have being heretofore impropriated to religious houses before the dissolution. 2. It was not resolved, whether an appropriation may not be to a lay * corporation, there being no judgment in *Alden* and *Tothil's* case. 2. That the act to be done is temporal, and no more than the writ *De admittendo Clerico*, *F. N. B.* 38. and induction is a temporal thing. 8 *Jac. Bulstr.* l. 1. 179. *Holt's* case. And an action lies against the archdeacon for not inducing, *F. N. B.* 47 *H.* 3. 51. b. and then *Coke sur Lit.* 96. b. If there be remedy in foro saeculari, then none in Ecclesiastico. As for *Dr. Lewes's* case it was not resolved judicially, and if it had, this point was not in question. As for *Dr. Widdrington's* case, I conceive though the conclusion of that case do nor, yet the reason given by the court upon granting the *Mandamus* will make for me; for then the writ was opposed with the argument, that there were special visitors, the court ruled, that a writ should go, because it appeared not to them till the return, that there were such. So that they took no notice that the bishop should visit; who is notorious.

As

Term. Hill. 16 & 17 Car. 2. B. R.

As for precedents, *Hob.* 270. *tantum habent de lege, quantum habent de Justitia*, and they are built upon reason and justice; now though I am not able to produce any other precedents, than what I have before mentioned; yet (as hath been by those who have argued on my side already observed) there is as much reason for this writ (if not much more) as to swear a town-clerk, churchwarden, constable, mayor or head of some corporation; nay for a scavenger, to command him to take upon him that office. *Mich.* 1652. The case of the inhabitants of *Clerkenwel*, and in *Bagg's* case, and 4 *Inst.* 71. In any case where there is oppression, which I conceive extends to this case, it appearing to the court that my client hath right to this place, but held out by a dilatory return. Lastly, This writ will not conclude the right of either party; but duly elected or not elected will be tried in an assize, or other action, as in the case of the abbot of *Fountain*, 9 *H.* 6. 32. b. And this very argument was prevalent with *Bryan* chief justice in 6 *H.* 7. 14. where the case was, A free-chapel was annexed by licence to *Magdalen* college in *Oxford*, the master avows for rent by the name of master of the college and *Custos Capelle*; and it was objected, that whereas it was set forth, that the union was by the licence of the ordinary, it did not appear whether the ordinary had any jurisdiction or no; and no resolution as to that point: But ruled by *Bryan* that it was all one to the tenant, whether it was a free chapel or visitable; for the rent was due, and no prejudice could be to the tenant by determining either way. The prejudice was the thing considered * by the court. So here no prejudice in granting, but much by not granting; and so I pray the writ to swear *Mr. Patrick*.

Baldwin contra. There are 4 things inquirable in this case. 1. Whether this college be a spiritual or a temporal foundation. 2. Whether by this return it appears, that there are any special visitors for this college. 3. Whether this court may intermeddle with the government of the college. 4. Admitting it may, whether it may do it *per Saltum*, or whether *Mr. Patrick* ought not first to have appealed to the bishop. 1. 'Tis a spiritual foundation, the fellows are called clerks, and (*ergo*) their study is theology, and the statutes of the college are, That they must enter into orders, and every college is of a spiritual foundation. 1. From the end, for the advancement of learning, 11 *H.* 4. 47. *per Thirning*. A grammar school is spiritual. *Seld. Hist. de Disines*, 121. Hospitalers and templers are religious, and yet no part of the clergy. *Linwood de Religiosis*

L. 5 E. 4. 112.
Precedents ne
rule le ley,
mes le ley ru
lera eux, Dyer
105. a. pl. 14.

* P. 112.

Term. Hill. 16 & 17 Car. 2. B. R.

118. 2. Colleges are governed as other ecclesiastical corporations. 8 *Aff. pl.* 29, and 31. 3. A thing of an ecclesiastical nature may be annexed to a college. 6 *H.* 7. 13. 10 *H.* 7. 19. 11 *H.* 6. 26, and 27. *Co. Lib.* 5. 10. *Caudry's case.* 7 *E.* 3. *Qu. Impedit* 19. *Dyer* 255. *Allen Clerk's case.* 2. It appears there are no visitors. 3. This court cannot intermeddle. 1. Because a college is a spiritual foundation, and hath a proper visitor. *Spelman's Gloss. verb. Visitator, Trin.* 13 *Car.* 1. *Allen versus Nash.* Ejectionment of the demise of *Huntley.* The defendant gave in evidence a deprivation of the lessor by the high commissioners; but resolved, That if he had been deprived by the ordinary, the court could not have intermeddled. 2. *Ab inconvenienti.* For if a *Mandamus* should lie for putting in a fellow, it would lie for a fellow that is turned out; and so it would be a charge to the scholars, and it would be against the dignity of this court to take notice of every trivial offence arising between the scholars in the universities. 3. This court did never intermeddle in this kind. So *Dyer* 376. Error of a judgment in the cinque-ports.

Object. *Dyer* 209. *Covenye's case.*

Resp. That case makes for *Bryan* my client.

Object. *Hern's case,* who was a fellow, and had a *Mandamus* to restore him, being turned out.

Resp. The visitor of that college was then the archbishop of *Canterbury*, and that see was then vacant, and so there was no proper visitor in being. As to *Crayford's case,*

* P. 113. *Resp.* * *Hobart Rep.* 17. *James's case.* The king is fountain of justice and distributes it accordingly. 4. Admitting that resort might be made to this court, yet it ought not to have been *per saltum.* 5 *E.* 3. *Fitz. Error.* *Curia advisare vult.*

The case solemnly argued by 4 judges, Norton and Keiling for the *Mandamus.*

Twisden and Wyndham cont.

The King against The City of Canterbury.

Privilege.
1 Lev. 159.

AN information was exhibited against *John Percival, Thomas Godfry* and *Walter Wilford, Esq;* for a riot and assault by them made upon one *Baker*, a messenger of the king, at the three Kings Inn in *Canterbury.* To which the defendants pleaded Not guilty, and a *Venire facias* issued to the sheriff of the city of *Canterbury* (which is a county of it self) and the sheriff returned a *Venire feci duodecim, &c.* Then there went out a *Disfringas*, and upon

Term. Hill. 16 & 17 Car. 2. B. R.

upon that the sheriff returns, That the city of *Canterbury* is an ancient corporation, &c. known by such name; and that by letters patent bearing date the sixth of his reign, king *James* granted to the said city, &c. that they should not be compelled to go out of the said city upon any cause whatsoever, &c. the sufficiency of which return was very much questioned by the court.

Hardres counsel for the sheriff, to make it good, argued, That the grant of exemption is good in point of creation, for which he cited 18 H. 8. 5. 42 Aff. pl. 5. 39 E. 3. 15. But the question (*he said*) would be, Whether the words are sufficient in the king's case; and he conceived they were, because they are, that the citizens, &c. shall not be compelled to appear before the king, or any judge in any jury, assise, recognition, &c. (excepting high treason,) and the occasion of the granting this patent he hoped would make it apparent, that it was the king's intention they should be exempted; for 23 H. 6. Exemption was granted to the citizens, and yet they went out of the city to assises, notwithstanding the first charter was confirmed 1 E. 4. But 4 Jac. a question arose upon a clause of this charter, when one *Robert Lad* was indicted for murder, and it was referred to the lord chief justice *Hobart* and the attorney general, and they certified that the charter was not sufficient, because the B. R. was not comprised in it, according to 8 H. 6. 21. 21 E. 3. 64. 11 Co. Rep. 64. *Dr. Foster's* case *coram Rege*; then comes this charter of 6 Jac. and if this does not aid in cases where the king is concerned, the patent will serve for nothing, for the * pre-
 * P. 114
 cedent charters have all the other clauses included in them. He confessed exemption did not extend to the king, unless he be named, and the words *licet tangat nos*. 42 Aff. pl. 5. 8 H. 6. 21. 39 E. 3. 15. But here the words are equivalent, and that is well enough. 8 H. 6. 19. Then as to the time of pleading this charter, it comes soon enough upon the return of the *Distingas*, for it can't come upon the return of the *Venire fac.* because no man is mentioned in it till it is returned. 18 H. 8. 5. Citizens shall not have advantage of a charter upon an appearance, but upon the return. 27 H. 6. 5. 34 H. 6. 25. 35 H. 6. 42. And if the return is naught an action will lie against the sheriff, because he did not obey the writ of allowance, which is also returned. 2 Inst. 130. 18 H. 8. 5. 22 E. 3. 20. Debt against a *Grecian*; The defendant prays to be tried *per medietatem lingue* upon the *Distingas*, and it was allowed, because it appeared upon the declaration he was an alien,

Term. Hill. 16 & 17 Car. 2. B. R.

alien. And it differs from the case in *Dyer* 357. *Stanf.* 89. because there it did not appear in the declaration that the defendant was an alien, for which reason he prayed the return might be allowed. But at another day in *Easter Term* 17 Car. 2. the court was of opinion that the return was naught. 1st, Because the sheriff having returned upon the *Venire fac.* that there were *probi & legales homines*, and now upon the *Disfringas* returning, that they ought not to appear, &c. contradicts himself, and is estopped by his first return. 2. The sheriff ought not to claim this privilege, but every singular person that is desirous to have the benefit of it. 3. He ought to have averred that there are no inhabitants in the city besides men of the corporation; for which reasons the return was quashed, and the sheriff fined a hundred pounds, and an *Alias Disfringas* was issued out.

* Term. Pasch. 17 Car. 2. B. R. * P. 115.

Sir Robert Hide Chief Justice.

Sir Thomas Twisden,
Sir Wadham Wyndham, } Justices.
Sir John Keeling,

Ward *versus* Marth.

IN an action upon the case for speaking these words of Words.
the plaintiff, *You are a baud, and I will prove you a baud,* ^{1 Danv. Abr.}
and you took 5s. for a clean pair of sheets for two whores and ^{95. p. 9.}
two rogues. And at another day, *she is a baud, and I will* ^{1 Sid. 241.}
prove her baud, and will have her carted for a baud. Upon ^{1 Keb. 862.}
Not guilty pleaded; and found for the plaintiff for all, and
intire damages given; it was moved in arrest of judgment,
that the first words are not actionable; for it is one thing
to call another baud, and another thing to say she keeps a
baudy-house. But by *Kelyng* justice, an action lies for cal-
ling one *baud*, because a baud is punishable in the spiritual
court by ecclesiastical censures; but judgment was staid
until, &c.

The King *against* Middleton.

MIDDLETON was indicted at *Guild-Hall* in *London*, Error.
and the sessions there were adjourned to the sessions ^{1 Keb. 867,}
at *Justice-Hall*, and there he was tried, and judgment gi- ^{879.}
ven against him for assault, battery and wounding of *J. S.*
And now he brought his writ of error, and assigned for er-
ror, that all the adjournments of the sessions are in the
preter-tense. But by the court 'tis the usual course in in-
dictments, and therefore * well enough, and all the prece- * P. 116.
dents are so, and therefore judgment was affirmed.

Williamson

Term. Pasch. 17 Car. 2. B. R.

Williamson *versus* Bolton and others.

Custom.
2 Danv. Ab.
314. p. 3.
1 Lev. 162.
1 Sid. 250.
1 Keb. 851,
868, 895.

IN trespass and imprisonment, The defendant justifies that *London* is an ancient city, &c. and in it there is, and has been time out of mind, a court of orphans which hath governed them, and granted the custody of them; and that there is, and time out of mind has been such a custom, that if any takes away and eloints an orphan, the court may commit the eloinor to *Newgate* till he discovers where the eloinnee is, and that one *Amos Pain*, a citizen, died 1 Jan. 14 Car. 2. leaving issue an infant named *Mary* of the age of thirteen years, who was committed by the said court to the defendant *Bolton*, &c. and that the plaintiff took her away out of the defendant's custody and elointed her, and that upon this the defendant was summoned to the said court, and appeared, and there refused to discover where the infant was; upon which the court adjudged that he should be imprisoned; and this is the same imprisonment. To this plea the plaintiff demurred. And *Williams* for the plaintiff argued, 1. That the custom of it self is naught. 2. That it is not well pleaded. As to the first, That the custody of orphans appertains to the mayor and aldermen, and that they may commit without summons. By *Bagg's* case there ought to be notice and summons to the party. 2 *Inst.* 46. 2. There is no lawful trial for the party to acquit himself, but only the discretion of the mayor and aldermen, confession of the party and examination of witnesses. 3. The duration of the imprisonment, because the party may be innocent; and the words, *till he be discharged by due course of law*, do not aid him, because there is no remedy by *Habeas Corpus* nor by appeal. 4. The extent of the custom is to all manner of persons, and so may extend to peers, and others not citizens; besides the party has an ordinary remedy, viz. *Ravishment de Gard. F. N.* 142. g.

Object. The custom is confirmed by act of parliament.

Resp. That is of no value, if the custom is unreasonable.

2 *Inst.* 142. **Dyer* 245. b. 22 Car. 1. B. R. *Estwick's* case. As to the second, the custom is not well pleaded. They ought to shew how this appears that he is guilty, *Specot's* case. 3. This case is out of the custom, because it appears that **Mary Pain* was not married at the time of the commitment. 4. The custom is to have all her estate, though it be in any part of the realm, and out of the liberty of the city.

* P. 117.

Fitz. Gard.
166.

Wild

Term. Pasch. 17 Car. 2: B. R.

Wild recorder contra, for the defendant. 1. This crime of eloignement of a child is in the nature of a theft, and he called it a plagiary. As to the 2d, It is in vain to plead summons for him that is present in court. As to the 3d, There is a difference betwixt a plea and a return, for a plea shall be taken according to common intendment. As to the 4th, This is a court of record; and a court of the city of London, and grounded upon the custom of London. *Hutt. 30. Andrew's case, Hob. 247. Luck's case.*

As to the 1st *Objection*, Here is a conviction without trial.

Resp. The court hath no other course by custom than examination, which shall be intended legal examination.

As to the 2d *Objection*, Duration of imprisonment, that is grounded upon the reason of the common law, as in a *Homine replegiando*, *Reg. 79.*

As to the 4th *Objection*, (*viz.*) The extent of this custom to peers.

Resp. 1. Person shall be intended such which shall be subject to imprisonment. 2. Peers are not exempt from contempts. 11 H. 4. 15.

As to the 5th *Objection*, That there is an ordinary remedy, *F. N. B. 142.*

Resp. This is only for damages, but here it is for the person it self.

As to the 6th *Objection*, He ought to have shewn how this appears.

Resp. This appears upon examination, and the offence appears, (*viz.*) The taking away the orphan.

As to the 7th *Objection*, That the case is not made according to the custom, because it does not appear that *Mary Pain* was unmarried.

Resp. Consider the time in the plea, (*viz.*) 1 Jan. 14 Car. 2. *Amos* the father died leaving *Mary* within the age of fourteen, and the twenty-seventh of the same month the custody was committed to the defendant, and the twenty-ninth of the same month she was eloigned, and she shall not be intended to be married without making it appear; and the plaintiff ought to have shewn this; and the whole court was for the defendant; and judgment was given accordingly for the defendant.

Infant.
2 Danv. Abr.
773. P. 3.
1 Lev. 163.
1 Sid. 252.
1 Keb. 896,
909, 934.

ERROR upon a judgment in *C. B.* in a *Formedon* in remainder. The plaintiff counts of a feoffment, 38 *H. 8.* by *Alexander Amcots*, and makes title to himself; the tenant being an infant, by guardian pleads, That *John Amcots* was seised in fee, and prays that the parol may demur; the guardian dies, the demandant counter-pleads the age, and traverses the seisin in fee and discent; and upon this was a special verdict; and judgment for the demandant; the tenant brings a writ of error, and assigns for error in the manner of the judgment, (*viz.*) That it is final where it ought not to be so.

Newdigate serjeant for the plaintiff. In the writ of error the judgment ought not to be final, but only a *respondes ouster*.

Here are four things to be premised. 1. That it is all one in a special verdict as in a general verdict. 2. The nature of the plea is considerable. 3. The infant had no disadvantage. 4. There is a difference when there is a demurrer upon such plea, and when a special verdict, and when a demurrer is in the same term, and when in another term. 1. In respect of the nature of dilatories in general, 1 *Inst.* 134. In all pleas by the tenant, in disability, the law giveth liberty to pray in aid and voucher. 9 *Co.* 84. *Conye's case*. In a *Cessavit* against an infant, the parol shall demur. 2 *Inst.* 291. Infancy is preferred before dower. *Cro. Jac.* 398.

Object. Here is a verdict.

Resp. It is the same as if verdict, and no difference in reason; for the plaintiff might have demurred, and a demurrer is more tedious than a verdict. 2. When it is an issue upon a collateral point, the judgment shall not be final, but a *Respondes ouster*. Appeal 18 *E.* 3. *Fitz. Outlawry* 47. *Bro. Peremptory*. 28 *Affise*, pl. 52. 6 *Affise*, pl. 1. 40 *Affise*, pl. 2. L. 5 *E.* 4. 90. *Bro. Peremptory* 44. *Fitzh. Issue* 14. *Bro. Peremptory* 69. 1 *Inst.* 135. *Co. Entries* 321.

Object. Delay.

Resp. We must distinguish between delays, for dilatories are allowed in real actions. If it be a delay that an infant shall not be prejudiced but with a contempt, it shall be one. *Cro. Eliz.* 467. *Holford versus Plat*, 8 *H.* 7. 8. It is error to deny a dilatory; this plea is not found to be false, (*viz.*) minority.

Object.

Term. Pasch. 17 Car. 2. B. R.

* *Object.* 24 E. 3. 76. *Bro. Peremptory* 22. by *Wilby*, P. 119.
25 E. 3. 80. *pl.* 2.

Resp. The reason of that case is, If he had been of full age it should be peremptory; but here the plea is not false.

Object. If a demurrer in another term. *Fitz. Voucher* 17 and 119.

Resp. It is the same reason, for none shall be prejudiced by the act of court; as adjournment, continuance, &c. *Voucher* is in stead of a plea in bar; it is not a delay with contempt no more than 8 H. 7. 5. *Plow.* 364. *Fitz. Affise*, 43. The delay is by the demandant himself, for he imparled four terms.

Object. *Latch* 177. *Cademan's* case.

Resp. The conclusion was not good; the demandant himself prayed only that the tenant shall be ousted of his age, and therefore no other judgment shall be given in a plea after *Darrein Continuance*. *Yel.* 18. *Hawkin's* case.

Jones for the defendant. As to the prayer of the demandant, it is so in all pleas to the writ, *quod breve cassetur*. It is a general rule *L. 5 E. 4. 90. b.* in every action, if issue be joined and found, it is peremptory for the tenant or defendant; and no difference betwixt an infant and another, if the books and authorities do not contradict this. In the case of a counterplea of a voucher, this is not in nature of a plea in bar, because it is not peremptory after demurrer, before the statute of *Westm. 2. cap. 6. Excommunication*, 3 H. 4. 3. 50 E. 3. 20. But these differences are to be observed, 1. In every dilatory plea, after issue against the tenant, it is peremptory. 2. Upon dilatory demurrer it is not peremptory in one case, (*viz.*) after the *Darrein Continuance*, *L. 5 E. 4. 139. 2 E. 4. 10. Yelv.* 112. *Fitz. Issue* 14 and *Age* 122. by inspection it is not peremptory, because by the judges. The reason is. 1. Upon a verdict the delay is greater. 2. The matter of fact lies more in the intelligence of the plaintiff.

Twisden justice. This is a ground, If a dilatory be pleaded and found against him, it is peremptory. *Adjournatur*.

* P. 120.

* Pritchard's Case.

Parliament.
1 Lev. 165.
1 Sid. 245,
1 Keb. 871,
884, 887.
850, 525.

THE House of Lords in parliament made an order for the apprehending of *Pritchard* to commit him to prison. Before the order executed the parliament was prorogued. The serjeant at arms five days after the prorogation of the parliament arrested the said *Pritchard*, and had him in custody, and now he brings his *Habeas Corpus*.

Coleman for the defendant. 1. The return here is insufficient, because it is not shewn that he was committed by virtue of an order of the House of Lords. 2. Because the commitment is not lawful, for every prorogation is *quasi* a new parliament. 3. He is committed for not payment of fees; and it doth not appear what.

Kelyng justice. If a man be committed by parliament which is prorogued, the court may bail him. Here the return is not sufficient, because no day is mentioned when the warrant came to the serjeant at arms, and therefore the party ought to be discharged.

Wyndham justice to the same intent, because it shall be presumed that the party was taken after the parliament prorogued. *Bro. Parliament* 86. Every sessions is a new parliament. 1 *H. 7. 20. Flowerdew's case*. Judgment given in parliament may be executed by the chancellor *quia transit in rem judicatam*.

Twisden justice accordingly: Be the person taken before or after the parliament prorogued he is to be discharged.

Hide chief justice of the same opinion. 22 *E. 3. 23*. A writ came to the chief justice of this court to remove a record. By the court he was discharged.

Whaley versus Anderson.

Mich. 14 Car. 2. Rot. 399.

Treason.
1 Sid. 260.
1 Keb. 329,
874, 905,
909, 933.

IN ejectment of a demise from *Springate* and *Stapley*. On Not guilty pleaded, the jury found a special verdict, That *William* marquess of *New-castle* being seised in fee the 19th of May 16 Car. 1. demised to *More*, *Wolrich* and *Alestry* for ninety-nine years, upon condition to pay 2500l. in the year * 1700, and 200l. *per annum* in the mean time; *More* dies, and then *Wolrich* and *Alestry* 12 Febr. 17 Car. 1. assign to *Warren* and *Lanyon*. *Edward Whaley* purchases the reversion. *Warren* and *Lanyon* 1 November 1656. assign

* P. 121.

Term. Pasch. 17 Car. 2. B. R.

assign to Sir Charles Harbord, and agree, that if *Whaley* pay half a year's interest and principal upon the 17th of *Novemb.* then the assignee shall be in trust for him. *Edward Whaley* doth not pay the principal in 1638. by indenture betwixt *Springate, &c.* for the use of his daughter upon marriage with *John Whaley*. *Harbord* assigns to *Springate* in trust by the direction of *Edward Whaley* to permit *John Whaley* to take the profits of 200*l.* per annum, the remainder to the wife for life, and the residue for the charges of the trustees, and after to *Edward Whaley*. The 2500*l.* was paid by *Springate* to Sir Charles Harbord; the marriage took effect; the last indenture was not in trust for *Edward Whaley*. The 25th of April 12 Car. 2. by the act of attainder *Edward Whaley* was attainted, and all manors, &c. of which he was seised were forfeit; and upon the whole matter, If for the plaintiff, &c. and the main question was, If this trust shall be forfeit to the king by the act of attainder.

Jones for the plaintiff. The king hath no title in law to these lands. 1. What right or interest *Edward Whaley* had by these indentures. 2. What may accrue by this forfeiture. As to the 1st, There are three indentures, and so many pretences. 1. A reversion upon payment of 2500*l.* 2. *Edward Whaley* had a contingent trust by the second indenture. 3. The residue of the profits was to him. 1. He cannot have a right by the redemption, because the king shall not be in a better plight than *Whaley* himself. As to the 2d, touching the interest upon the contingent, This is passed, and depends upon an act to be done, which was not done, (*viz.*) payment upon *November* following. The third upon the third indenture. If by this limitation of the residue of the profits, the king hath a title to the land? And he conceived not. 1st, The verdict finds that the trust was to *John Whaley* for 200*l.* a year, and to the trustees for their expences, and then to *Edward Whaley*. The jury doth not find that any residue remains, nor that the land is of any value, and then no surplus shall be intended. To the 2d, If the interest of the king shall swallow the whole land? And he conceived not. 1. I agree, that in case of forfeiture upon attainder the king is intitled to personal things intirely; as in the case of an obligation, a horse, &c. the attainder * of one jointenant shall forfeit * P. 122, all, but not of things in possession, which may be divided. 3 Inst. 55. Chattel real in possession; and *Flow.* 243. intimates so much, because he instances only in intire chattels.

Term. Pasch. 17 Car. 2. B. R.

Object. Dame Hale's case, Lease for years forfeit by a jointenant.

Resp. The pleadings of this case shew the case to be of a lease assigned to baron and feme after marriage, and so no moieties betwixt them. 2. The reason of this case is the relation from the time of the forfeiture, which is there a disposition; but in case of jointenancy the one may grant only a moiety; but in our case there is no jointure, and they cannot take the profits together; but there is a priority of time between them, they may be tenants in common by perception of the profits. The words of the act of parliament are, *All lands, &c. of which Edward Whaley had any estate, or any in trust for him, shall be vested in the king, &c.* But there is also a saving to all strangers; the king shall have the same estate in law as the party had in equity, and not more; and therefore if the trust had been for John for life, the remainder to Edward, the king shall have only the remainder, and not the possession. Here Edward can never have the possession of the land. If Edward had brought his *Subpœna*, he should never have the possession, for there are precedent estates; but the trustees shall deliver the surplus to Edward. It is like to the statute of uses, for this statute of attainder executes trusts. If the trust had been, that the trustees shall permit the *Cestuy que Trust* to perceive and take such annual sum, it shall be vested in the king.

Bigland for the defendant. Consider the case, 1. Without reference to the deed of settlement, and then the case is, 1. When Edward Whaley purchases the reversion he hath a right of redemption. 2. When the mortgagee and the reversioner join in an assignment; although the money was not paid at the day, yet the trust remains. Where an estate is once vested in the king, nothing shall divest it. 1 *Inst.* 118. *Cro. Jac.* 82. — versus *Wyndham. Moor* 196, 815. *Palmer's case.* If the trust had been, that Edward Whaley shall have all the profits, then the term it self shall be in the king, *Adam and Lambert's case*; The king shall have all because a mixt interest. *Plow.* 423. Here the king hath something, and if it do not appear what part he shall have, he shall have all.

Wyndham justice. A lease upon condition to pay at a day to come, and then the lessor makes another lease by estoppel, and then procures another to pay the money; the lease by estoppel shall take place.

P. 123.

Kelyng justice for the plaintiff.

Twisden justice. The question is, If the equity of the trust

Term. Pasch. 17 Car. 2. B. R.

trust be forfeit, and it seems not; and it was adjourned; and after judgment was given for the plaintiff.

Willan *versus* Gill.

GEORGE ALLINGTON makes his will, and *Gilham* and *Denhurst* his executors; *Denhurst* makes his will, and executors, and dies; *Gilham* dies intestate, his administrator sues the executor of *Denhurst* for a legacy due from *Allington*. *Simpson* moved for a prohibition. Prohibition.

Twisden justice. Here by the spiritual law the plaintiff may sue the executor of *Denhurst* as executor *de son tort*.

Kelyng justice. The executor of *Denhurst* may be sued as executor of his own wrong, but then he cannot be sued as executor of *Denhurst*, but as executor of *Allington*.

Twisden justice. In our law it is so; but in the ecclesiastical law perhaps it is otherwise.

Wyndham justice accords with *Twisden*, it is more proper for an appeal than a prohibition.

Twisden accords, and a prohibition denied by three against *Kelyng*.

Buck *versus* Angel.

THE plaintiff counts, that whereas he had procured one *Woodward* at the request of the defendant to surrender a lease, the defendant would pay, &c. On *Non Assumpsit* pleaded, and verdict for the plaintiff, it was moved in arrest of judgment, because it is not said that the defendant assumed and promised. And to *Twisden* justice it seemed not to be a good declaration, and so it was ruled in the first case that he ever moved in this court. But it seemed to *Kelyng* justice to be only matter of form. But judgment was stayed until, &c. Assumpsit.
1 Danv. Abr.
74. p. 1.
1 Lev. 164.
1 Sid. 246.
1 Keb. 872.

* *Burton versus Robinson*.

* P. 124.

DETINUE for a deed, and verdict for the plaintiff, that the defendant detained the deed, and 20l. damages; and then issued out a *Disstringas* to deliver the deed or the value, and after that a writ of inquiry issued for the value, and found a different value from the first verdict; and it was moved that the last damages found on the writ of inquiry shall stand. *Rast. Entr.* 214, 219. *tit. Judgment in Detinue* Inquiry.
1 Sid. 246.
1 Keb. 882.

Term. Pasch. 17 Car. 2. B. R.

Detinue c. 3. And *Chenye's* case here doth not oppose this, because here attaint doth not lie.

Kelyng justice. There cannot be damages and a writ of inquiry also.

Twisden justice. There ought to be both; and it was adjourned, and after adjudged for the plaintiff.

Errington versus Hirst.

Intr. Trin. 16 Car. 2. Rot. 505.

Debt.

1 Keb. 883.

DEBT upon an obligation against an executor. The defendant pleads *Non est factum*; and upon this the jury found a special verdict, viz. That the testator of the defendant sealed and delivered the obligation, and that the plaintiff was a commission officer, and detained the said testator in prison until he had entered into this obligation. And they found the act of oblivion that pardons all acts of hostility, and all appeals and personal actions by reason of them shall be discharged, and that all persons may plead the general issue, that the defendant nor testator are not excepted.

Turnor for the plaintiff. There are two points. 1. If this obligation be nulled by this act; and it seems that it is not. 2. If the defendant may plead *Non est factum*? And it seems he cannot.

To the 1st, It is not within the words of the act, because there is no mention of an obligation given to another.

2. It is not within the meaning, because it is not a crime or offence. *Plowd. 173. Hill versus Grange.* Words ought to answer the sense of a statute; the act was intended for the benefit of the plaintiff, who was a commission officer.

* P. 125. * *Object.* Or relating thereto.

Resp. This obligation is collateral to the offence, and not relating; for relating ought to be preceding and not subsequent, and therefore it was adjudged, *Dyer 14 b. Tunc* is extended until, 164 and 286. 5 Co. *Clayton's case*, 2 Inst. 112. A statute ought to be expounded to prevent prejudice to a third person.

As to the 2^d, He cannot plead *Non est factum*, but the special matter, and conclude *Issint nient son fait*. 1 H. 7. 15. 5 Co. 119. *Whelpdale's case*, *Hob. 72.*

Linty for the defendant. As to the 1st, It is within the words of the act in a legal sense. Personal actions include the

Term, Pasch. 17 Car. 2. B. R.

the causes of action. 1 *Inst.* 285. 8 Co. 153. *Littleton* sect. 512. it extends to obligations. There is another clause, viz. *That all differences betwixt the subjects, &c.* and all that had followed upon it. Here this act of hostility which occasioned the obligation. 2. This is within the intent, which was to take away all those things which might be the cause of future disturbance.

As to the 2d, If the act had said that the obligation shall be discharged, then it ought to be pleaded; but here it is that the obligation shall be void, and that the defendant may plead the general issue.

Kelyng justice. The act enures between man and man, as a release; that the imprisonment is discharged is clear; then it seems the obligation shall be discharged.

As to the 2d, The general issue aids where the defendant cannot justify at common law; here may be a justification at common law.

Wyndham justice. A contract seems not to be discharged by this act, although many of them were forced by acts of hostility. A man takes a horse in those times, trespass doth not lie, but upon demand trover lies.

Twisden. Acts of hostility shall be intended matters of force.

As to the 2d point, The act gives a latitude to the party. And it was adjourned.

* *Merril versus Rumsey.*

* P. 126.

Intr. Hill. 14 Car. 2. Rot. 689.

EJECTMENT for land in in the county of
Monmouth. Upon Not guilty the jury found a special Remainder.
verdict, viz. That *Edmund Williams* seised in fee 20 Aug. i Sid. 247.
15 Car. 1. by indenture covenanted in consideration of marriage, and 600l. portion to levy a fine to the use of the i Keb. 388
conusees till a recovery had, and then the recoverers should be seised to the use of *Edmund* and *Dorothy* for their joint lives, the remainder to the heirs of the body of *Dorothy* by *Edmund* ingendered, remainder (*Dorothy* surviving *Edmund*) to *Dorothy* for life, remainder to the right heirs of *Edmund*; the marriage takes effect, a fine is levied, but no recovery was had; and there is a clause in the deed, That if there was not any recovery, that then the conusees should stand seised to the uses before mentioned. *Edmund* and *Dorothy* have issue two daughters, *Rachel* and *Elizabeth*; *Edmund* dies,

Term. Pasch. 17 Car. 2. B. R.

dies, his widow marries *William Watson*, the daughters are lessors of the plaintiff.

Winnington for the plaintiff. The design of this conveyance was, that if the husband died before his wife, that his issue should have it; here *Dorothy* hath no title, but the daughters.

1. When the freehold determines.
2. If it determines upon the death of
3. If the contingent remainder fail, if the other takes.

As to the 1st, This freehold upon which all the remainders depend, determines upon the death of the husband, because it is for their joint lives; although a joint estate to two shall be intended to the survivor, 5 Co. 9. *Brudnel's* case; but if a particular limitation be, it is otherwise.

To the 2^d, Remainder to the heirs of the feme ingendered by the baron, these are words of purchase and not of limitation, and then contingent, so they cannot take, as 1 *Inst.* 22. b. Where the ancestor takes an estate for life, the remainder over to him and his heirs, it shall be by limitation and not by purchase. There is a difference where the freehold is absolute and intire determinable upon life, and not upon a determinable estate for life, where by possibility it may * continue and consolidate. An estate to *A.* for life, the remainder to *B.* for life, remainder to the right heirs of *A.* they are words of limitation. But not when a determinable freehold, as an estate during widowhood, remainder to his right heirs; here they are words of purchase. 10 Co. 85. *Lovie's* case. Lands given to *A.* for life, remainder to *B.* for life, remainder after the death of *A.* to *B.* and his heirs.

* P. 127.

To the 3^d, Then the contingent remainder is destroyed.

3 Co. 20. *Boraston's* case.

Powis for the defendant. Here is an estate-tail executed in the wife; it had been clear if the wife had died first.

2. If the estate be limited to *A.* for life, the remainder to the heirs of his body, it is an estate-tail executed, 1 Co. 204. and there is no difference in this case.

1. It is within the words of *Shellie's* case, 1 Co. 104. because an estate limited to one for life is a freehold indefinitely. 21 H. 6. 54. a. 33 H. 6. 5. b. 40 E. 3. 20. & 21. It behoveth not that the freehold continue; and *Lovie's* case cited on the contrary part is not to the purpose; the case in point is in *Perkins* *feA.* 337.

2. The wife hath a freehold for life. And it is like the case where land is given to baron and feme, and to the heirs of the body of the feme, and she dies. *Dyer* 99. *Fitzh. Br.* 81.

Kelyng

Term. Patch. 17 Car. 2. B. R.

Kelyng justice for the defendant. This estate is an estate-tail executed *sub modo*, (*viz.*) not as to division of the jointure; but it is to other purposes; and so all the other justices held, and judgment was given for the defendant.

Hunt *versus* Swain.

THE plaintiff declares that the father of the defendant was obliged to the plaintiff in an obligation, and that the defendant is his son and heir; and that the plaintiff notified to the defendant, that he intended to sue him; and upon this the defendant, in consideration that the plaintiff would forbear the defendant, promised to pay the money due upon the obligation. The defendant pleads *Non Assumpsit*, and found for the plaintiff. And it was moved in arrest of judgment, that it is not said that the heir was obliged in the said obligation with his father.

* *Wild* serjeant for the plaintiff. That it shall be so intended; and he cited the case of seignior *St. Paul* and his wife against the earl of *Rivers*.

Assumpsit.
1 Danv. Abr.
57. p. 57.
1 Lev. 165.
1 Sid. 247.
1 Keb. 890,
900.
2 Keb. 62.

* P. 128.
Trin. 1656.
B. R. *St. Paul*
and his wife
against the Earl
of *Rivers*.

The plaintiffs declare, That whereas the father of the defendant obliged himself to the plaintiff's wife, *dum sola fuit*, in the sum of 400*l.* for the payment of 200*l.* which father is now dead, and the defendant is his son and heir, to whom the plaintiff repaired, and intimated that he intended to sue the defendant as son and heir for the said debt; the defendant upon consideration of forbearance assumed to pay, &c. And upon *Non Assumpsit* pleaded, and a verdict for the plaintiff, serjeant *Twisden* moved in arrest of judgment, because it is not said, that the father obliged him and his heirs, and therefore it does not appear the defendant was liable to an action, and so the consideration is void. But adjudged that it should be intended, it being found by the jury, according to *Bidwell* and *Cotton's* case. *Hob.* 216. and the plaintiff had judgment upon my own argument; but otherwise adjudged between *Barber* and *Fox*. Trin. 22 Car. 2. B. R.

Twisden justice. By this way presumption shall aid any thing; but I confess that *Rolls*, when he was chief justice, was of the opinion, that it was good in this case after verdict; but I conceive the material thing is omitted.

Wyndham justice. The defendant hath admitted himself to be bound, by the desire to give time to pay, and therefore it shall be presumed that he was bound, and so the plaintiff shall have judgment.

Kelyng justice. The forbearance only will not maintain the action; for in the action against an executor he ought to shew that he is executor, but here it is laid that he is heir; as if I lay a man to be executor, although he hath no assets, it is good.

Hide chief justice. There is a grand difference between an heir and executor; and it was adjourned. *Vid.* *Hob.*

Term, Pasch, 17 Car. 2, B. R.

Hab. 18. *Woollaston* versus *Web*, 1 *Leon.* 114. *Grey's* case cited in *Stone* and *Withypool's* case. 2 *Cro.* 602. *Bard* versus *Bard*, contra *Telo.* 56. *Fish* versus *Richardson*.

Rogers versus *Mascal*.

Process.

1 *Sid.* 248,

259.

1 *Keb.* 890,

908.

2 *Keb.* 7, 17.

TRESPASS in assault and imprisonment. The defendant pleads that the 26th of Feb. in the Palace court one levies a plaint against the plaintiff, and the defendant as serjeant of the said court takes him by virtue of process upon this plaint. The plaintiff demurs.

Offey for the plaintiff. The justification is by several process out of the palace court, and doth not say it is by prescription or letters patent.

* P. 129. 2. It is said that *Cage* levied a plaint in the nature of an action upon the case, and upon this a *Capias* issued, and the officer returned it. The immediate process here is attachment by the goods, where it ought to be a summons. 34 *H. 6.* 49. a.

3. *Capias* is not a process within an inferior court, because the statute which gives a *Capias* doth not extend to it. *F. N. B.* 92. *G.* 100. *D.* The statute of 19 *H. 7.* cap. 9. gives a *Capias* in *B. R.* and *C. B.* but not otherwise; and there is a difference where the jurisdiction is general, erroneous or void, process doth not expose the officer to false imprisonment. 10 *Co.* 76. But otherwise it is in an inferior jurisdiction. *Cro. Car.* 394. and 395. *Nicholas* versus *Walker*.

4. It doth not appear the court had jurisdiction. It is said generally, that the plaint was in nature of an action upon the case, and it may be such an action as cannot be brought in an inferior jurisdiction. *Mich.* 17 *Car.* 1. *Bye* versus *Olive*, *Rot.* 545. or 548.

Pemberton for the defendant. As to the 2d, It is a court of record which ought to have such process. 2. Summons doth not lie in an action upon the case, but a *Capias* lies in trespass in any case, and it is a general entry in all courts; and the case of *Dye* and *Olive* is not to the purpose. To the 3d, Summons is not a process in an action upon the case, but a *Pone*, *F. N. B.* 92, and 93.

Object. It is not said, *quod profertur hic in Curia* the letters patent by virtue of which the court is held.

Resp. The defendant is only a bailiff, and cannot have them, upon the reason in *Leyfield's* case, and *Dyer* 29. Sub-letsee ought to shew the lease, but sub-collector and under-sheriff

Term. Pasch. 17 Car. 2. B. R.

sheriff not. 36 H. 6. 14. 22 H. 6. 42. An incumbent shall not shew the title of his patron. 36 H. 6. 14.

Object. It is not said of what sum or place the court had jurisdiction.

Resp. It is a court of record, and so hath consueance of all sums; and so is the plea of consueance of pleas, the plaint is not levied of any sum but generally. As to the place, it is said to be within the jurisdiction, and cannot be traversed how many miles it extends, but only that it is not within the jurisdiction.

Object. A *Capias* doth not lie within an inferior jurisdiction.

Resp. 1. Admit this process doth not lie in an inferior court, yet the court having jurisdiction the officer is not to be punished. 10 Co. 76. 2. By the equitable interpretation of the statute of 19 H. 7. cap. 9. it will extend to other courts. As the statute that gives debt against the warden of the fleet * extends to the sheriff. This statute of 19 H. 7. * P. 130. doth not give the *Capias* alone, but at the common law 2 Inst. 434. *De* where originally there was not summons, but a *Pone*, and *uxor' abducta* then a *Capias*. *Capias* is not the process by this statute, cum bonis viri. If at the common law, it is but the exigent. 35 H. 6. 6. a. pl. 9. *Capias infinita* was before, and not the exigent. Experience shews that before the statute a *Capias* issued in these courts. *Rast. Entr.* 293. a. *a Pone*; if by the statute, attachingat. A memorandum made that the process given by this statute is an exigent.

Twisden justice. This exception has been taken, but it is cured by appearance.

Wyndham justice. It seems process in an action upon the case was a *Capias infinita*. But after it was adjudged for the defendant by all the judges besides *Hide* chief justice, who was then dead.

Memorandum, The first day of this term died Sir Robert *Hide* lord chief justice, who was a man expert in the pleas of the crown, but especially in those which concerned a justice of peace.

Term.

There being then only three Judges, viz.

Sir Thomas Twisden,
Sir Wadham Wyndham,
Sir John Kelyng, } Justices.

Worral *versus* Brand and other two Executors.

Death.

1 Lev. 165.

1 Sid. 259.

1 Keb. 902.

906, 925.

Escape against

two sheriffs,

and the one

dies. Noy 72.

Cro. Eliz. 625.

Bannion *versus*

Watson, &c.

ASSUMPSIT against two executors. After issue joined, one of the executors dies, and then the plaintiff suggests upon the roll that the other was dead, and upon this there is a trial against the other.

And now Jones for the defendant moved in arrest of judgment, and the question was, If the death of the one abate the writ as to both; and it seemed to him that it did.

1. In all actions of trespass, which are grounded upon a tort, the death of one shall not abate the writ of the other; but if it be founded upon contract, as *Nihil debet* or *Ne unques receiver*, &c. there by the death of one the writ is abated against the other. In debt. 4 E. 3. 26. b. 50 E. 3. 7. In account. Fitzh. Br. 263, 344. Authorities in the case it self. Plowd. 186. b. Woodward *versus* Darcy, 37 H. 6. 16. are ases in point. 10 H. 4. 18. In detinue. 2 H. 4. 18. b.

Pemberton for the plaintiff. There is no reason for this difference put by Jones; in 50 E. 3. 7. there it was, that he was dead before the action brought, and the writ was false. 37 H. 6. 16. A writ of error was brought, and it was moved for the plaintiff, but it was never argued; there is cited the 1 E. 3. but there is no such case. As to Plowd. nothing was de, and no judgment there given; Cro. Car. 426. Tiffen's case, an action against two and one dies, and no suggestion bore the *Venire Fac.* and yet good. 41 E. 3. 3. Account against two, and one dies, the other shall answer over. *Breit. Respondes ouster. pl. 4.* No reason for one

Term. Trin. 17 Car. 2. B. R.

one more than another, as in outlawry. Here * is no other * P. 132.
 action or better brief, and the abatement shall be a mischief
 to the plaintiff, but none to the defendant by the allowance;
 for the defendant may plead *Plenement administer*, and the
 promise survives. And there is a difference where there
 are two plaintiffs and where two defendants. Resolved by
 the court that the writ is abated; and they relied upon
Woodward and Darcy's case, and 37 H. 6. But see *Hern's*
precedents 102, 139. to the contrary.

With this
 Judgment a-
 grees 1 Leon.
 44. *Knight's*
Case, but *Cro.*
Eliz. 652. *con-*
tra, & 701.

Opey versus Thomasius.

UPON a special verdict in an *Ejectione firmæ* of land Estate.
 in *Devon*, the case was to this effect. *Rous* seised of 3 *Danv. Abr.*
 lands in fee, by indenture makes a lease to *Thomasius* for 195. P. 4.
 99 years, if three lives live so long. And then settles the 198. P. 9.
 reversion upon himself in tail, with a power to make leases 1 Lev. 167.
 for one, two or three lives, or for 21 years in possession; 1 Sid. 260.
 and then he leases for 21 years to commence after the first 1 Keb. 772,
 lease, and then conveys over the reversion by fine; the 910.
 first lease determines; and the question was if the conusee
 may avoid this second lease, which, as was admitted, was
 not within the power, because it was not in possession.

Jones for the plaintiff. There are two points. 1. If the
 second lease be pursuant to the power in the first indenture.
 2. Admitting that it is not, then if the conusee shall avoid
 this lease made by the tenant in tail.

As to the 1st, There be two parts of powers: 1. To
 make leases in possession. 2. Leases in reversion. It doth
 not come within the power to make leases in reversion, be-
 cause they are tied up to special particulars for any number
 of years determinable, &c. 6 Co. 33. *Leper and Wroth's*
case, *Cro. Eliz.* 5.

Object. It is a lease in possession, because there shall not
 be two leases extended by one and the same power, and it is
quasi a possession.

Resp. 1. Observe the intent of the deed. 2. In pleading,
 possession may be of a reversion, but not in a conveyance;
 for there it ought to be according to ordinary parlance, and
 the subject matter guides the thing. *Cro. Jac.* 318. *Haw-*
kin's case.

As to the 2^d, Tenant in tail of a reversion makes a se-
 cond lease after the expiration of the first, and then levies a
 fine to a stranger, if the conusee shall avoid the second
 lease; and it seemed to him he should. 1. If this second * P. 133.
 lease

Term. Trin. 17 Car. 2. B. B.

lease be void or voidable; and he held it was void. 2. If the conusee may avoid it.

As to the 1st, It is void; *Westm. 2. cap. 1.* Tenant in tail shall not have power to alien to the prejudice of his issue, but otherwise it is voidable. Tenant in tail grants a rent-charge, it is void against the issue, tenant in tail makes a lease without reserving a rent, it is void. *Plow. 436. 12 H. 8. 8.* The reason of these cases is, because it is an apparent prejudice to the issue; and the statute doth not measure the acts which the tenant in tail doth by his estate, but with the consequence of the prejudice that may come to the issue by them; and here is an apparent prejudice; for if he may make a lease in *futuro* he will deprive his issue of the liberty of alienation according to the statute, and also to levy a fine. This upon the reason since the statutes of 32 H. 8. 4 H. 7. 6 Co. 41. 1 *Inst.* 223. This lease is a clog. 2. This lease being by way of future interest, the issue is in paramount this future interest, for it is not an estate until it is executed, for a surrender may be notwithstanding it. When tenant in tail makes a lease in *futuro* the statute preserves the issue. *Cro. Jac. 445. Griffin's case.* A lease after death is void, although a rent be reserved. *Dyer 270. per Manwood.*

As to the 2^d, The conusee shall have the same power, *Plowd. 437. Smith versus Stapleton.* Feoffee may enter upon lessee, 1 *Inst.* 46. b. and no difference betwixt conusee and feoffee.

Object. *Dyer 51.* Tenant in tail makes a feoffment, and makes a lease for years.

Resp. No resemblance, for when tenant in tail makes a feoffment the tail is discontinued, and then the joining with the feoffee is good.

Object. *Cro. Jac. 692. Craker versus Kelsey.*

Resp. The issue there had barred the intail and himself, and therefore the conusee shall not have more power than the tenant in tail himself.

Winnington for the defendant. This lease is pursuant to the power, which is to be regarded at the time of the creation; possession may be applied when it is to take effect in possession. Intent of the parties, I confess, *Hawkin's case* in *Cro. Jac. 318.* to be against this opinion, but the record of that case doth not warrant it. And *Yelo. 222.* reports the same case wholly different from *Crook*; but admit that the power is not pursued, yet 1. This lease is only voidable. 2. Not voidable by the conusee.

As

Term. Trin. 17 Car. 2. B. R.

* As to the 1st, Tenant in tail makes a lease *in futuro*, * P. 134.
rendering rent, this lease is only voidable. *Plow.* 434. is a
case in point. 1 *Inst.* 46.

Object. *Dyer* 279.

Resp. *Catlin* there denies the opinion of *Manwood*. It
had been good although no rent had been reserved, till
avoided. *Hutt.* 102.

To the 2^d, The conusee cannot avoid this lease. *Westm.*
2. de donis. The issue hath power to elect *post prolem susci-*
tatam, tenant in tail hath power by the common law.
The conusee doth not come in in privity of the estate-tail.
Dyer 51. b. 7 Co. 9. *Count de Bedford's* case. Tenant in
tail makes a lease *in futuro*, and then levies a fine, the
lessee enters, the conusee enters upon him, and the fine is
reversed. *Dyer* 263.

Kelyng justice. The first point concerning the power is
the principal point; tenant in tail makes a lease *in futuro*,
it is not void, but voidable only, and the conusee shall here
have advantage of election as well as the issue.

Wyndham justice. If the lease be in *Esse* at the time of
the settlement. A lease made by the power to commence
after the lease in being is determined, is good. *Dyer* 357.
There is a difference when the land is in possession, and
when it is in lease. Tenant in tail makes a lease without
rent, it is not void, but voidable. because there may be co-
venants in it, and there is also fealty, &c.

Twissden justice. Powers are to be expounded according
to the intent of the parties. Tenant in tail makes a lease,
it is only voidable, the conusee shall not avoid it, because
the estate-tail is barred, and he cannot come in in privity;
and matter of election is transferable. *Latch, Arnold and*
Warner's case. And it was adjourned.

Winne versus Lloyd. See before.

A WRIT of error was brought to reverse a common Error.
recovery in *Wales*, and judgment in the common re- Antea 16, 55,
covery is affirmed; and now *Williams* moved for costs for 70, 96.
the defendant in the writ of error, according to 3 H. 7.
cap. 10. he cited Co. Inst. 162. *Cro. Eliz. Grove's* case,
and *Cro. Eliz. Penruddock's* case; and although there is not
any delay here according to the words of the statute, yet
this is to be intended where execution may be; but here is
no * execution to be had. But the court denied to give * P. 135.
costs,

Term. Trin. 17 Car. 2. B. R.

costs, because there is not any delay of execution; and at the common law there was no costs in a writ of error.

Low *versus* Beardmore.

Case.
2 Danv. Abr.
210. p. 11.
1 Lev. 169.
1 Sid. 261.
1 Keb. 881,
915.

AN action upon the case against the defendant for falsely and maliciously indicting the plaintiff for a rescous. And on Not guilty found for the plaintiff,

Powis for the defendant moved in arrest of judgment, that such action upon the case doth not lie for indicting one for a bare trespass, and this indictment was but a trespass.

And as to the *objection*, That the plaintiff declared, that the defendant *scienter* indicted him,

Resp. It is the common declaration which is *falso & malitiose*.

Wyndham justice. The case of *Langly* and *Clark* was debated for an action for an indictment for taking his wife with an intent to ravish her; and it seemed there for the defendant.

Mich. 1659.
Chamberlain
versus Prescot.
The Plaintiff
brought a special
action
upon the case
for maliciously

indicting him upon 8 *Eliz. cap. 2.* for procuring the defendant to be arrested in another man's name, who disowned the suit; and the plaintiff declares that he being a freeman of *London*, and a merchant, and reciting the statute, the defendant caused him falsely and maliciously to be indicted upon that statute. And upon Not guilty pleaded, and a verdict for the plaintiff, *Allen* moved in arrest of judgment that this action would not lie, it being only a trespass in its nature; and if it should be allowed, it would discourage prosecutors: But notwithstanding the plaintiff had his judgment.

Kelyng for the defendant. Such actions would deter men from prosecuting; and he seemed to be for the defendant; but it was adjourned. *Vid. postea Henly versus Bursfal* 180.

Jemot *versus* Cooly.

Estate.
3 Danv. Abr.
163. p. 4.
1 Lev. 170.
1 Vent. 193.
1 Saund. 112.
1 Sid. 223,
262, 344.
* P. 136.
1 Keb. 784,
915.
2 Keb. 20,
184, 270, 295.
3 Keb. 6.
Postea 158.

EJECTMENT of the demise of sir *Ralph Bovey* of lands in *Amersham* in the county of *Bucks*; on Not guilty pleaded, the jury found a special verdict, viz. That *Francis Drake* 20 July 1651. for 6000*l.* granted a rent-charge to the lessor of the plaintiff of 420*l.* a year, and in the deed was this clause; And the said *Drake* doth grant that if the said rent shall be in arrear at any of the days of payment above twenty days, that then it shall be lawful to and for the said *Bovey* to enter into the said lands, and the same

Term. Trin. 17 Car. 2. B. R.

same to retain until he be satisfied the said arrears. The rent is behind at one of the days, and the lessor enters and demises to the plaintiff.

Jones for the plaintiff. The sole question is, if the lessor of the plaintiff hath any interest in the land it self by these words. Here it is not any question, If the interest be an inheritance, freehold or chattel, because sir *Ralph Bovey* is alive; but that this estate is an interest. *Littleton* sect. 327. There it is not a condition, because then he ought to avoid the whole estate by his entry. 1 *Inst.* 217. This interest is a chattel created by the agreement of the parties. *Littleton* doth not put it by deed indented, but it ought to be so intended; for a feoffment in fee rendering rent cannot be without deed, because not good by way of reservation. 1 *Inst.* 143. It hath been held that a rent upon a feoffment may be by deed poll. *Doct. & Stud.* 74. 11 H. 7. 22. 14 H. 7. 36. This interest is a chattel, because it is a penalty annexed to the rent. *Cro. Jac.* 510. *Havergil* versus *Hare*.

Object. It is a fee, because heirs is in, and then it doth not pass without livery.

Resp. These words do not design what estate, but who shall have the remedy.

Authorities in the point, *Hill.* 13 *Jac.* C. B. *Rot.* 868. *Brown* versus *Hagger*, cited in *Price* and *Vaughan's* case. If tenant by *Elegit* make a lease to try a title, it is good, although he hath an incertain interest. 1657. B. R. *Harri-son's* case, the case of a tenant-right.

Thursby for the defendant. It cannot be a chattel-interest because incertain. *Lit. Sect.* 380. *Bracton*, *Britton*, &c. do not mention any such incertain interest. 37 H. 6. 26. *Quas tenuit dum sola fuit, quamdiu se bene gesserit.* 4 Co. 30. *Durante viduitate.* Bro. *Leases* 67. Pet. Bro. sect. 462, & 463. *ibid.* & 468. But it doth not appear that livery was made. 14 H. 8. 10. & 14. 8 Co. 96. *Cordel's* case, It cannot be raised by grant. 1 *Inst.* 42. and the reason is because suppose the land will not answer the debt, then it shall be a perpetual chattel, yet 258. *Green* versus *Edwards*, at some times it may be created, 1. By parliament, as tenancy by *Elegit*. 2. Things in a grant may be so, as a rent. 11 *Aff. pl.* 8. Common 17 *Aff. pl.* 7. In the case of the king. 8 H. 4. 17. *Quamdiu in propriis *manibus*, be-
cause no other ceremony is requisite, but here it is in the case of land. 3. In case of a will it may be so granted. *Cro. Eliz.* 315. *Cordel's* case, 3. H. 7. 13. 4 Co. 82. 4. In a feoffment upon condition to hold till the feoffee be
satisfied,

Term. Trin. 17 Car. 2. B. R.

satisfied, *Ge. Litt. sect. 327. 44 Aff. pl. 3. Plowd. 524. Fitzh. Barr 280. & Done 210.* but this is only as a pledge, and not an estate. In case of a replevin, a condition may be so. *1 Inst. 146. Fortior est obligatio hominis quam legis.* It is not an estate for years, nor a freehold. Not a freehold, 1. Because it commences in *futuro*. 2. It is without livery, and therefore it is only an estate at will, and it is not found that it is not determined. Tenant at will cannot make a lease to try his title against his lessor, *Blundel and Baugh's case*; and here the defendant enters by command of the lessor.

Twifden justice. The case cited of *Brown and Hagger* is material.

Wyndham justice. The lessor hath only an estate at will.

Kelyng justice. The case of *Littleton* cannot be maintained by reason, but only by the authority of the author. and it was adjourned. *Vid. postea.*

Marke versus Johnson.

Office.
1 Keb. 898,
919.

IN an ejectment. On not guilty pleaded, the jury found a special verdict, which was in effect, That a lease is made by the king for years, provided that upon non-payment of the rent the lease shall be void. And the question was, If the rent is arrear, the king may grant this term *de novo*, without finding by office that the rent was unpaid at the day.

21 Jac. c. 25.

Kelyng justice. The statute of 21 *Jac. cap. 25.* makes an alteration of the common law; for now a lease shall not be void, as before; but now an office ought to be found, that the rent is not paid, and here is no office found: but upon this special verdict there is a special conclusion, and therefore good enough. But it was adjourned.

Thatcher versus Ullocke.

Pleading.
1 Keb. 920.

IN trespass *Quare clausum fregit*. The defendant pleads, that *H. 8.* was seized in fee, and so the lands descended to the king that now is, and that he as servant, &c. The plaintiff replies, that *H. 8.* granted to the plaintiff, and doth * not traverse the dying seized of king *Charles the First*, and it might come to the king otherwise. *Dyer* 170.

Twifden

Term. Trin. 17 Car. 2. B. R.

Twisden justice. A traverse 'needs not, and if it came to the king again, this ought to be shewn in the rejoinder; the last seisin shall be traversed, if it might be gained by disseisin. *Adjourned.*

The King *versus* Wagstaffe and others.

WAGSTAFFE and others, citizens of *London*, being sworn upon a petty jury at the sessions at the *Old-Baily*, to try *Gosse* and divers others, indicted upon the late statute of conformity, refused to find the parties indicted guilty, contrary to their evidence, which in the opinion of the judge was full and pregnant; and upon this the court fined them 100 marks a-piece, and ordered them to be imprisoned till they paid the said fine. And now they bring a *Habeas Corpus*, and upon the return of this, all this whole matter appeared, and upon mature consideration they were remanded.

And by justice *Kelyng* (who was in the same court, and gave the rule at the same sessions for the same fine and imprisonment) It is clear that the law is so; yet see *Hollinshead Chron. par. 1. lib. 2. cap. 4. fo. 155.* and *part 2. 1405,* and *1126. Throckmorton's case,* and *Leeche's case* before.

And by *Twisden* justice. The judge is intrusted with the liberties of the people, and his saying is the law, and a man could not have a bill of exceptions at the common law, till *Westm. 2.* And now this doth not lie in matters of the crown. And so it was adjudged, that the return was sufficient, and the prisoners were remanded.

Juror-
Hard. 401.
1 Sid. 272.
1 Keb. 934,
938.
— fo. 99.
See before
Leeche's case,

12 Co. 23.
Jurors are pu-
nishable in the
Star-Cham-
ber.

• P. 139. * Term: Mich. 17 Car. 2. B. R.

THIS term was adjourned to *Oxford* by reason of the plague in *London*; and in this term no special verdict was argued, nor judgment given upon any demurrer, or special verdict by order and proclamation. And only two returns of the term kept; that is to say, *Ostabis & Martini*. And this term justice *Kelyng*, who was *puisne* judge, was made now lord chief justice, and sir *William Moreton* knight, the king's *puisne* serjeant, was made a judge in the place of justice *Kelyng*.

• P. 140. * Term: Pasch. 1653. C. B.

Intr. Hill. 1651. *Rot.* 1732.

Thomas Corbet *Plaintiff*, Francis Stone *Defendant*.

Hartford.
Remainder.

IN *Ejectione Firmæ*. The plaintiff declares upon a demise of *Robert Slingsby* Esquire, of one messuage, 200 acres of land, 60 acres of pasture, 40 acres of meadow, 20 acres of wood in *Barkeway*, dated the 11th of *August* 1651. *Habendum* for seven years from the 10th of *August* *aforesaid*. The defendant pleads Not guilty. And the jury at the bar gave a special verdict.

As to the house and 60 acres of land, &c. That *Frances* Duchels of *Richmond* was seised thereof in fee, and being so seised, *June* 1632. 8 Car. 1. By indenture made between her of the one part, and *John* lord *Powlet*, sir *Edward Gourdon*, sir *Edward Hungerford*, and sir *Richard Young*, of the other part, in consideration that *Henry Prannel*, her late husband, did out of his affection convey (amongst

(am
and
way
to h
fame
and
live
duri
ther
of J
nel,
time
their
respe
the c
Th
procl
wife,
•
and c
Th
ture
Fran
said
by th
unto
daugh
said n
Th
Henry
her ar
said E
Edwa
tion o
the H
ties th
child
coven
before
nors o
of Ha
Thoma
son, &
Trin
Tha
1634.

Term. Pasch. 1653. C. B.

(amongst others) the lands in question to her and her heirs, and that she had no issue of her own to inherit, she by way of loving contribution thought fit to convey the same to his next heirs, and for execution thereof did demise the same to the said *John* lord *Pawlet* and the rest; To have and to hold to them from thenceforth for 40 years, if she lived so long, in trust that she might receive the profits during her life; And after her decease, then the one moiety thereof shall be, remain and come unto *Mary Clark*, wife of *John Clark* Esquire, eldest sister of the said *Henry Prannel*, and the other moiety unto *Joan Brook* widow, sometime the wife of *Robert Brook* Esquire deceased, and to their executors, administrators and assigns severally and respectively, for and during the term of 1000 years from the death of the said *Frances*.

Trin. 10 Car. 1. after a certain fine was levied with proclamations, &c. by the said *John Clark* and *Mary* his wife, and find it in *hæc verba*.

* And it is of the moiety of the manor of *Newfils*, &c. * P. 141. and other lands.

That afterwards the 21st of *February* 1634. By indenture between the said *Joan Brook* of the one part, and *Frances Brook* and *Katharine Brook* of the other part, the said *Joan Brook* did thereby recite the said indenture made by the said duchess and the grounds thereof; And did grant unto the said *Frances Brook* and *Katharine Brook* her two daughters the said term and interest of 1000 years in the said moiety.

That the 3^d of *June* 1637. The said duchess and *Henry Brook* did seal and deliver an indenture made between her and one *Denzil Hollis*, and *Dorothy* his wife, and the said *Henry Brook* of the one part, and sir *Richard Young* and *Edward Savage* of the other part, Whereby in consideration of her near alliance to the noble and princely family of the *Howards*, and the support of the high titles and dignities that may come and descend to *Thomas Howard*, grandchild and heir apparent of the then earl of *Arundel*, the covenants with sir *Richard Young* and *Savage*, that she will before St. *Andrew's* day next levy a fine of all those manors of *Newfils*, and of all other her lands in the county of *Hartford*, to the use of her self for life, afterwards to *Thomas Howard* aforesaid for life, remainder to his first son, &c. in tail male, &c. with divers remainders over.

Trin. 13 Car. 1. The fine was levied, &c.

That the duchess at the making of the deed, 21 *Feb.* 1634. and at the fine levied continued possession.

Term. Pasch. 1653. C. B.

And that sir *Richard Young* in the first deed, and sir *Richard Young* in the fine, is the same person.

Ult. Octobris 1639. The duchess died.

3 Nov. 1639. The said *Thomas Howard* the younger, now earl of *Arundel*, entered, claiming by the same fine and indenture.

That after the said fine levied and before the ejectment lease, the interest of the said *Mary Clark*, and of the said *Frances Brook* and *Katharine Brook*, to the lands in question, came to the lessor, *Robert Slingsby*.

Afterwards and before the ejectment lease the said *Joan Brook* died intestate.

Afterwards, &c. 50 Junii 1651. administration was committed to the said *Robert Slingsby*, who afterwards upon the possession of the said earl did enter and was possessed prout, &c. who the said 11th of August 1651. made the lease to the plaintiff prout in the declaration, who was possessed, until the defendant *Stone* did by command of the said now earl of * *Arundel* enter upon him, and actually eject him. And if for the plaintiff, for the plaintiff; and if for the defendant, for the defendant.

* P. 142.

Glyn serjeant. I pray judgment for the plaintiff.

The points are, 1. Whether the estate limited to 1. *Mary Clark*, 2. *Joan Brook*, be good, and what kind of estate?

2. Whether the fine levied by *Mary Clark*, and her husband, 10 Car. 1. do operate any thing upon her interest?

3. Whether the fine levied by the duchess doth turn the estate of the sisters to a right, so that they can any way be barred thereby by that fine and non-claim?

4. Whether a good title be found by the jury for the lessor Mr. *Slingsby*?

1. Point. I conceive the limitation to *Mary Clark* and *Joan Brook* is a good remainder for 1000 years.

Every deed shall be taken most strictly against him that makes it. And if it cannot take effect as the parties express; yet it shall take effect as it may, rather than the deed shall be void. *Bredon's case*, 1 Co. 76. If tenant for life, the remainder in tail, the remainder over, tenant for life and he in the first remainder levy a fine *sur consuſance*, &c. to another in fee, who renders a rent-charge to the tenant for life; resolved this is no forfeiture or discontinuance; *ut res magis valeat quam pereat*. And the law construes this, the grant of the remainder man first, and after the grant of tenant for life. 38 H. 8. Bro. Fine 118. there cited. If tenant in tail, and A. levy a fine to a stranger, who grants and renders to A. for years, rendering rent, and by the same fine

fine grants the reversion to tenant in tail and his heirs, this is good. And although all be by one fine in an instant, yet in judgment of law the lease precedes the grant of the reversion, *ut res magis valeat*.

30 *Aff. pl.* 47. If tenant for life, and he in reversion in fee make a feoffment by parol, it shall be the surrender of tenant for life, and the feoffment of the reversioner. But if by deed, otherwise. *Vid.* 6 Co. 14. 15. *Treport's* case applied.

In this case it appears, that the intention of the duchess was to give an estate for 1000 years, and the words are, *And after her decease, then the one moiety shall be, remain and come, &c.* And the scope of the deed was that she would advance her nieces, being the sisters of *Prannel* her former husband.

1. *Object.* That no estate passed because it is by indenture, and the sisters not parties, and so they cannot take. *Hob.* 313. *Winfmore's* case, 314. *Greenwood*.

* *Resp.* The difference will be between a present estate and an estate in remainder. It's true, he that is not party to the indenture, cannot thereby take a present estate, but may take by way of remainder. *Lit. sect.* 374. proves this, where he puts the case, If a man by indenture grant an estate to *H.* for life, the remainder to another in fee, upon condition, this is a good remainder, and he shall be bound to perform the condition though he was no party. 1 *Inst.* 131. *Coke* on this section takes this very difference that I have taken. And *Hob.* 313, 314. are judgments in the very point, with that difference. *Greenwood's* case was, lord *Sturton* seised in fee, by indenture demised to *Thomas Hobart, Habend.* to the said *Thomas Hobart* and *Michael Hobart*, and to one *John Hobart* and *Henry Hobart*, the sons of *Thomas*, for term of their lives, and the life of the longer liver of them *successive*. Resolved by the court upon great debate, that none could take immediately, but *Thomas Hobart*, because he is only party to the deed, and the rest not named but by the *Habendum*, then they cannot take but by way of remainder; yet in this case they could not so, because of the incertainty who should take first, according to the book of 20 *Eliz.* *Dyer*, the words being omitted *prout nominatur in Charta*, and the same difference agreed in *Greenwood's* case, fol. 314.

2. *Object.* That the sisters were not named in the premisses.

Resp. That is not material; and in truth when a remainder is limited it is most proper to come in the *Habend.* and it

Term. Pasch. 1653. C. B.

it cannot be otherwise; and the cases before cited grant the estates in the *Habend.* The common conveyances of *Eng-land* prove it; A lease for life to *A.* remainder to the right heirs of *J. S.* 2 Co. 81. *Bredon's case*, *Esc. Plow.* 160. *a. Tracy and Nicholson's case* 93. An estate may be granted in the *Habend.* to whom none is in the premises. So I conclude this point that *Mary Clark* and *Jean Brook* have a good remainder for 1000 years.

1. Because the grant shall be expounded best for the grantees.

2. Because of the intention.

3. It hath a present estate to support it.

Now the next question upon this point will be, What kind of remainder this is, *viz.* Whether a remainder vesting presently or a contingent?

It is a contingent remainder. For the lease made by the duchess to the lord *Pawlet*, *Esc.* is for forty years, if she live so long; and after her death, to come, remain and be as to one moiety to, *Esc.* so the remainder is not after the end of the term, but after the death of the duchess, which may be within the forty years, or after the forty years; so that its doubtful whether the remainder will vest *eo instanti* that the precedent particular estate shall end or not.

* P. 144.

In which case by the rule of our books the remainder is contingent. 3 Co. 20. in *Boraston's case*. If one grant to *J. S.* for life, remainder to the right heirs of *J. D.* this is a contingent remainder, *viz.* It's a good remainder if *J. D.* dies in the life of *J. S.* but otherwise if *J. S.* dies before this vest.

10 Co. 17. *Lampet's case*. A termor devises his term to *A.* for life, remainder to *B.* It is there agreed that this is a contingent possibility. Upon the same reason, if *A.* shall live after the term, the remainder shall never vest; but if during the term he dies, it shall vest.

In *Plowd.* the case put in *Colthurst's case*, A lease is made to *A.* for life, the remainder to *R.* for life; if *B.* dies before *A.* the remainder to *C.* for life, this is a good remainder upon a contingency, *viz.* if *B.* dies before *A.*

So in our case the lease is made to the lord *Pawlet* and others for forty years, if the duchess live so long, and after her death the remainder to *Mary Clark* and *Jean Brook* for 1000 years; this is a contingent remainder; for the particular estate on which it depends is the estate for forty years, which may or not determine before her death; if it determine before, then the remainder, as a remainder, is gone.

Objec.

Term. Pasch. 1653. C. B.

Object. My brother *Bernard* would seem to object that this remainder should not be good because of that manner of limitation; for it is not to begin after the forty years, but after the death; and so the life of the duchess interposed, and compares it to the case put in *Colthurst's* case, *Plowd.* 25. If the estate be limited to *A.* for life, and after the death of *A.* and one day after, to remain to *D.* for life, that is a void remainder, which is law.

Resp. But the reason is because there is no probability for the remainder to vest when the particular estate ends, which is a necessary incident to every remainder: but there is a possibility in our case, for if the duchess die within the forty years, then the particular estate ends when the remainder commenceth. This is expressly agreed in 3 Co. 20. *Buraston's* case. If a lease be made to *A.* for twenty years, if *B.* shall so long live, and after the death of *B.* a remainder over in fee, this remainder is void, because if the remainder shall * be good, then shall the fee-simple be in abeyance, * P. 145. which the law will not suffer. But if the remainder had been for years it had been good, for that may be in abeyance; and so he concluded the first point.

2. Point. Now the estate being thus settled (*viz.*) a remainder for 1000 years to *Mary Clark* after the death of the duchess, the jury find that afterwards *Trin.* 10 *Car.* a certain fine with proclamations thereof made according to the form of the statute by the said *John Clark*, and the said *Mary Clark* his wife, in C. B. the tenor whereof followeth, and recites in *hac verba*, &c. whereby it appears, that *Thomas Roper*, Esq; and *Robert Pickring* were plaintiffs, *John Clark* and *Mary* his wife deforciant. The fine was of the moiety of the manor of *Newsis Rookey*, *Walter Andros* and *Berwick*, eight messuages, four cottages, and three tofts, and divers numbers of acres in *Barkway*, *Barley* and *Royston*; so the point is whether *Mary Clark* by this fine hath passed away her interest, or extinguished it in the lands in question: And he held she had not.

1. Because it is not found that the fine was levied of the lands in question, and if it be not found, being matter of fact, the court will not presume it.

Object. That it appears that the fine is levied of lands of the same name, and in the same place, as are mentioned in the indenture of *June* 1632.

Resp. If it were so, unless the jury find it to be the same lands, the court cannot presume it; for it may be of lands of the same name and in the same place, and yet not the same

Samuel Bishop.

Term. Pasch. 1653. C. B.

same lands; and the presumption is against it; for if it had been the same, the jury would have found it so: and it were dangerous for the court to supply it by intendment, for thereby they might subject the jury to an attainder.

2. But in truth it doth not appear the fine was levied of lands in the same place or name, as in the indenture of June 1632.

For the lands given *Mary Clark* by the indenture are the moiety of the manor of *Newfils*, &c. situate in the parishes of *Barley*, *Read* and *Royson* in the counties of *Hartford* and *Cambridge*, or one of them; and the fine is of lands in the county of *Hartford*, and so non constat whether the same.

* P. 146.

* 2. Admit the fine were of the same lands; yet I conceive the estate of *Mary Clark* is neither given away or extinguished.

The case for that is,

The lord *Pawlet* is lessee for forty years, if the duchess live so long; this is in trust that the duchess might receive the profits, the remainder after the death of the duchess to *Mary Clark* for 1000 years. The duchess being in possession, *Mary Clark* levies a fine to a stranger *sur consance de droit come ceo*, &c.

1. Nothing passeth from *Mary Clark*; for *Mary* during the life of the duchess, hath not any interest in her to grant; for the remainder being contingent is not grantable over, 10 Co. 47. *Lampet's* case, devise of a term to *A.* for life, and after his death to *B.* this being but a possibility is not grantable during the life of *A.* and yet this is an executory devise, which is much favoured, 4 Co. 66. *b.* in *Fulwood's* case accordingly, and 8 Co. *Mathew Manning's* case. One devises a term to baron and feme for one and twenty years, remainder to the survivor of them; neither baron nor feme during their joint lives may grant this over; so that with some clearness he held that the fine doth not give the estate of *Mary Clark*, because it is not grantable.

2. This contingent remainder is not by the fine either released or extinguished, 10 Co. 48. in *Lampet's* case, it is said, that a right or title to a freehold or inheritance, whether it be present or future, may be released in five manners. 1. To the tenant of the freehold in deed or in law without privy. 2. To the tenant in remainder. 3. To him in reversion without any privy; but an estate cannot be enlarged so. 4. To him that hath a right only in respect of privy, as if a tenant be disseised, and the lord release the services to the disseisee. 5. In respect of privy without right. But in our case the consuees of the fine

fine levied by *Mary Clark* have not any of these qualities, for they have neither estate in the land in question, nor priority, or right, &c. therefore the fine cannot operate by way of release.

3. By way of extinguishment or estoppel it cannot be; for the right in remainder is not in the conusor; and it is not an estoppel to any but those who claim under the conusees of the fine; for an estranger shall not take advantage of it, because it is not reciprocal. *Vid. 2 Co. Buckler's case.*

* 3. Point. If the fine levied by the duchess to *sir Richard Young* puts the remainder to a right, so that for default of entry within five years, this is a bar, or the remainder is destroyed. I hold that the fine doth not touch either the estate for forty years, nor the remainder for 1000 years. * P. 147.

As to that, the case is, the lord *Pawlet* and *sir Richard Young* are lessees for forty years, if the duchess live so long, the remainder over to the sisters. Now the clause in the indenture is, that the duchess shall take the profits, and the continuance in possession makes her lessee at will to the lord *Pawlet* and *sir Richard Young*.

Now that she is tenant at will, *Vid. 1 Inst. 171. q.* If *H.* enter into lands by the consent of the owner, he is tenant at will, *Littl. 108.* *H.* makes a feoffment in fee upon condition to perform his will, and the feoffor enters, *Littleton's* opinion is, that he is tenant at will; *Coke* is of that opinion, and so upon debate it was resolved, *Hill. 11 Car. 1. B. R.* betwixt *Wilkinson* and *Meriam*, *Cro. Car. 323.* In case of a mortgage the perception of the profits doth make the mortgagor become tenant at will to the mortgagee, and there adjudged that the mortgagee might devise the lands, *Cro. Jac. Powseley* and *Blackman*; so that the duchess here hath a rightful possession, and a fee-simple in the reversion. And then I conceive the fine doth not stir any of the estates for years, for these reasons.

1. Because it is a fine which works by way of grant, and if there be an estate large enough in the grantor to satisfy the grant, the law will never expound it a tort, if it may be otherwise. Now the duchess by fine grants a fee-simple, and she hath a fee-simple to grant, and therefore no wrong: upon this reason it is in *1 Co. 76. Bredon's case*, tenant for life, remainder in tail, tenant for life and he in the first remainder levy a fine to a stranger; adjudged there that it is not any forfeiture of the estate for life, neither

Term. Pasch. 1653. C. B.

ther any discontinuance of the remainder, because it is by fine; yet in this case, if it had been by feoffment without deed, it is there agreed to be a forfeiture and discontinuance. But any estate by fine that operates by way of grant, the law to avoid wrong expounds it so, That every one grants that that he may lawfully grant. 10 Co. 98. *sir Edward Seymour's case*. Upon the same reason, if tenant in tail

* P. 148. bargain and sell in fee, and then levies a * fine, this fine shall work no discontinuance or wrong. But the law to avoid a tort doth expound it to operate upon the base fee that was formerly granted, which wrought no discontinuance, as it is there adjudged; and yet if the fine had been levied before the bargain and sale, there it had been a discontinuance; for then the law had had no means to expound it otherwise.

2. *Reason*. Because the duchess being tenant at will continues the possession, as well at the time of the fine levied, as after, even to her death; and the possession of the tenant at will is the possession of him in remainder, and this preserves the estate without any wrong done to it, or turning it to a right. 1 *Inst.* 270. The possession of the particular tenant is the possession of the lessor, and the possession of the remainders. The possession of a guardian in chivalry or a guardian in socage is the possession of him in reversion. 29 *Affises pl.* 161. 20 *Affises pl.* 9. 22 E. 4. 14. a. &c. And the possession of a tenant at will doth much more intitle him in reversion to the possession than any other. For if tenant at will commit any voluntary waste and dies, and his heir enters, in such case the lessor may have an action of trespass *vi & armis*, &c. without any entry. *Litt. fest.* 82. 5 Co. 13. 10 E. 4. 18: 21 H. 7. 12. But in case of tenant at sufferance the lessor cannot have trespass without entry. Hence follows that the possession of the duchess is the possession of the lessor, so long as the will continues. The levying of the fine by the duchess is no determination of the will, for she continues her possession still; and the levying of the fine by her is a lawful act, and a lawful act shall never determine the will. 1 *Inst.* 85. A lease at will reserving the trees, &c. If the will be determined yet her continuance in possession makes her tenant at sufferance, which still continues the possession of the lessor. And the fine being a lawful act doth not turn the estate to a right. 9 Co. 104. *Podger's case*, 10 Co. 96. *Seymour's case*.

The 3d, and main reason. Because the fine is levied to *sir Richard Young*, who is one of the lessees for years, and by

Term. Pasch. 1653. C. B.

by the statute of 27 H. 8. cap. 10. the estate of sir *Richard Young* is expressly saved, as appears by 7 Co. *Lillingston's* case. If there be lessee for years to the use of another, and the lessor infeoff the lessee for years to uses, the term for years is saved by the proviso of the statute. So if the lord infeoff a copyholder to the use of another, the copyholder's estate is preserved. Then if the estate of sir *Richard Young* by express proviso of the statute of 27 H. 8. is saved, and no wrong done to it, it follows that the remainder is not touched. * P. 149.

The conclusion. If by the fine no wrong is done, and the estate for years not turned to a right, then no bar can be, and no claim is necessary; and this is resolved 5 Co. 124. *Sander's* case, cited to be adjudged in *Saffine's* case. If a man hath a future interest, and the lessor is disseised, and the disseisor levies a fine, the future interest is not touched, and because it is not turned to a right he is not bound to make claim. And the case put out of *Plowd.* 373. *Stowel's* case. If H. levy a fine in which another hath title of common, and five years pass, the commoner is not barred, because the fine doth not do any wrong to it.

3 Co. 77. *Farmor's* case, Agreed that a fine and non-claim doth not bind the estate, but the right; and therefore when the fine doth not turn the estate to a right there needs no claim. 9 Co. 105. *Margaret Podger's* case.

2d Resolution. That no fine bars any estate in possession, reversion or remainder, which is not divested and put to a right; and there it is also said, that he that at the time hath not any title of entry shall not be barred, so the possession continuing in the lessees, and not being turned to a right, there it is not touched nor barred by the fine.

4th Reason. Because the remainder limited to *Mary Clark* and *Joan Brook* is contingent, so that at the time of the fine levied it is not vested in them, but in the custody of the law, in which case a fine levied by a stranger doth not bar it, 9 Co. *Podger's* case, It is said when the estate is so settled, that he who claims the interest of it, cannot by any possibility enter and make his claim, he shall not be barred by the statute; for it is not reason that he shall be barred by non-claim who is not guilty of any laches; and therefore H. who had a future interest at the time of the fine levied shall not be barred. So in the case of feoffee upon condition, if he levy a fine, and five years pass, and then the condition is broken, he is not barred. And now in our case at the time of the fine levied the sisters could not enter, for

Term. Pasch. 1653. C. B.

* P. 150. for their estate was not in them, and therefore not touched, *Hill. 29 Eliz. Rot. 8240 C. B. Grant's case.* *John Grant* seised of lands * in fee, held in socage, devises them to his nephew *John Grant* when he comes to his age of twenty-five years, to hold to him and the heirs of his body; *John Grant* the nephew, after his age of twenty-one levies a fine of 'em to a stranger, and having issue after attains to his age of twenty-five years, and dies.

Three points were adjudged.

1. That the gift and devise to *John Grant* the nephew, was in contingency and *futura* at the time of the fine levied.

2. That the estate-tail in contingency was not barred by the statute of 4 H. 7.

3. That this estate in contingency was barred by the stat. of 32 H. 8. cap. 26. And this by force of the words of that statute, *All fines levied by proclamation, &c. of any mannors, lands, &c. before the time of the said fine levied, in any wise intailed to the person so levying the fine, or to any of his ancestors:* And this is a resolution for us, and our case is more strong; for in our case the fine is levied by a stranger, but in *Grant's case* by the party himself, and yet not touched by the statute of 4 H. 7. And our case clearly is not within the statute of 32 H. 8. for that there is no intail *per que*, &c. And admit the particular estate of 40 years should be turned to a right, and displaced, this right supports the remainder. 1 *Co. Archer's case*, *Co. Chudleigh's case*.

Object. The last thing objected was to the verdict, which found, that the interest of *Mary Clark*, *Katharine Brook* and *Frances Brook* came to the lessor, and doth not find how.

Resp. It is good enough; for when the jury finds the interest to come to the lessor, the court intends all circumstances which conduce to that fact; for the court does not doubt when the jury doubts not. 4 *Co. Fullwood's case* 65. The jury found that *Thomas Castle* came before the recorder of *London*, and mayor of the staple, and acknowledged himself to owe to *Thomas Rivet* 200*l.* Exception was taken, that there was no finding of any statute there, for it was not found that this was *secund' formam Statuti*, and that it was by writing.

Resp. It is good enough, for all circumstances shall be intended.

The court did object and doubt that the remainder limited by the two sisters was void, because, 1. That it could

Term. Pasch. 18 Car. 2. B. R.

could not pass to them by way of present estate, because they were not parties to the indenture. 2. It could not be a * contingent remainder, being a remainder for years * P. 151. depending on an estate for years; and there cannot be a contingent estate for years; because a lease for years operates by way of contract, and therefore the particular estate and the remainder estate operate as two distinct estates grounded upon several contracts; but it is true, such a remainder may be of a freehold, as upon an estate for life, the remainder to the right heirs of J. S. and then in law the particular estate, and the remainder, is but as one estate in law, and is created by the livery.

2. The court objected, that the sisters were barred by the fine and non-claim: for admit it be by way of contingent remainder, when the remainder vests the sisters are bound within five years after to enter; as in case where tenant in tail, remainder in tail doth levy a fine, and tenant in tail dies without issue, he in remainder is bound to enter within five years after the death of the tenant in tail, else he is barred. Judgment for the plaintiff.

* Term. Pasch. 18 Car. 2. B. R. * P. 152.

MILLS had a *Mandamus* to restore him to the place of one of the approved men of *Guilford*; and upon the return appeared just cause of restitution, and upon that the parties submitted by rule of this court to *Onslow* and *Weston*, who made an award that *Mills* should be restored, and the approved men refused to restore him. And upon this serjeant *Wild* moved for an attachment against the approved men. But by the court an attachment doth not lie against a corporation: but if it be granted *nisi*, and the corporation will not restore him, the court will grant a restitution.

Mandamus.

1 Lev. 162.

1 Keb. 868,

880.

2 Keb. 1.

Dixon

Term. Pasch. 18 Car. 2. B. R.

Privilege.

Dixon had a debt due to him from *Killegrew*, a grand officer of the king's household, and for that he could not arrest him, he took *Process* and outlawed him, and *Killegrew* hearing of it, caused the plaintiff to be imprisoned, and *Dixon* obtained an *Habeas Corpus* of the chief justice in the vacation, and an *Alias & Pluries*, and upon speech with the king, the chief justice informed him in this manner (as the chief justice reported in open court, (*viz.*) *That his servants are free of arrests, and therefore he should not be deprived of them without his leave*; but this privilege is for the advantage of the king, but not for his servants, and therefore they may be sued, so as he be not deprived of them, and so may be outlawed. But notwithstanding this resolution, *Dixon* was arrested again and imprisoned; and now *Kelyng* moved for a *Plur. Habeas Corpus*, and the court granted a *Habeas Corpus* but not a *Pluries*, because none was granted before in open court.

* P. 153. * — *versus Harvey Executrix of Sir Job Harvey.*

Survivor.

IN debt. The defendant pleaded a joint judgment against the testator, and *Erasmus Harvey* who is now alive, and that he had not assets beyond the said judgment to satisfy. The plaintiff demurs; and adjudged for the plaintiff, because the lien survives, and the executrix not liable. *Vide antea* 26. *Edsar* and *Smart*.

Mandamus.

A *Mandamus* was granted to restore the recorder of *Barnstable*, directed to the mayor of the corporation; and he returned *quod non constat nobis*, that he was ever elected; and the return adjudged insufficient, and restitution awarded.

Bretton versus Prettiman.

Assumpsit.

1 Danv. Abr.

45. p. 24.

1 Sid. 283.

2 Keb 26, 44.

2 Sid. 123.

Perkins versus

Binck,

IN ASSUMPSIT. The plaintiff declares, that the defendant promised, that in consideration that the plaintiff would take an oath that money is due to him, he would pay him; and the plaintiff avers, that he swore before a master in chancery. The defendant demurs; and adjudged for the plaintiff, because it shall be intended an affirmation upon solemn protestation, and not such an oath for which he may be indicted, *Cro. Eliz.* 470. *Knight versus Rusworth*, *Mich.* 1658. *Perkins versus Binck*. In consideration the plaintiff would come before a master in chancery and swear, he will pay; and adjudged for the plaintiff; and here

Term. Trin. 18 Car. 2. B. R.

here the subject matter expounds the thing. *Vide Mod. Rep. 166. Amy versus Andrews.*

A week before this term sir *Robert Bernard*, serjeant at law, died, who was a baronet, and of the county of *Huntington*.

* Term. Trin. 18 Car. 2. B. R. * P. 154

This term was very defective in business, and therefore I did not attend above two or three days, in which no case remarkable occurred; except the case following.

PRESENTMENT was in a leet in *Westminster* against Courts. Divers persons for using several trades, having not served as apprentices for seven years, according to the statute of the 5th of *Eliz.* and upon this presentment *Benet* chief bailiff of this liberty would have levied 40s. a month upon them, and they removed the presentments by *Certiorari*; and it was now debated if the leet had consueance of such things by the last clause of 31 *Eliz. cap. 5.* and it seems not, because the offences there mentioned, and the courts, shall be expounded, *reddendo singula singulis.*

The King against The Earl of Dorset, in Chancery.

UPON a *Scire facias* against *Richard* earl of *Dorset*, *Scire facias.* and others, members of *Sackville College* in *East* Postea 177. *Greenstead* in *Suffex*, to shew cause why the letters patent, which incorporated and constituted the said hospital, should not be repealed as they concerned *Edward* earl of *Dorset*, and the heirs males of *Robert* earl of *Dorset* who was the founder of the said hospital, and cancelled, and the enrolment

ment of them vacated. The *Scire facias* recites the will of *Robert*, and that he devised to his executors, by which it was provided, that his executors should found and endow the said hospital, and make by-laws, and that the heirs of *Robert* should have the patronage and visitation of the hospital; and the king by letters patent intending to incorporate the said hospital according to the said will, and that the charitable cure might be performed according to the intent of the founder, constituted the corporation, and granted licence to purchase the endowment intended. And he farther granted, that *Edward* earl of *Dorset*, who was heir

* P. 155. * male of the founder, should have the patronage and visitation. The *Scire facias* recites, That the lady *Thanet*, and the lady *Compton* are heirs of the founder, and that *Edward* earl of *Dorset* had taken upon him the patronage and visitation of the hospital, to the disinherison of the said ladies; and upon this *Scire fac.* the earl of *Dorset* demurs in law.

Finch solicitor general, for the earl of *Dorset*; and he said that this *Scire fac.* is rather *Process* in the name of the king, than the *Process* of the king himself; and such *Process* doth not consist with the interest of the crown; and reduced his argument into five heads. 1. This *Scire fac.* need not to be brought in the name of the king. 2. This *Scire fac.* doth not lie at the suit of a subject. 3. A *Scire fac.* doth not lie to repeal part of a patent. 4. This patent is good *in toto*. 5. Admit it is not good *in toto*, yet it is not fit to repeal this patent at this time.

As to the first. Because the conclusion of the writ is *ad damnum* of a particular subject, and the king cannot have a *Scire fac.* but where the thing is *in deceptionem Regis*, or *ad gravamen populi*. 10 Co. *Magdalen College's* case. The king is called *Sponsus Regni*, and the writ of *ad quod damnum* is, *Ita quod patria non gravaretur*; but if the writ be not brought against a publick injury, the king cannot make a private quarrel himself; and no *Scire facias* lies to repeal a patent but in two cases. 1. A *Scire fac.* to repeal a prior patent is always at the suit of a subject, 2 E. 3. 7. b. *Hill.* 16 E. 3. *Fitz. Grant.* 53. the case of the burgesses of *Wells*, 17 E. 3. *Dyer* 269. a. pl. 18. Lands held of the bishop of *Winton* were conveyed to the king by covin to make the bishop lose his seignior, and the king *sede vacante* granted them to the brothers *Carmelites*; and this grant was repealed by *Scire fac.* *Mich.* 21 E. 3. 47. a. pl. 68. and in the prince's case, 8 Co. the king brought the *Scire fac.* But the king there had an interest, and the prince

prince could not have those lands without the king by seizure. 2. Here it doth not appear to the court that the ladies ever petitioned to the king to have any such writ of *Scire fac.* *Pasch. 27 Eliz.* Sir Henry Nevil in chancery brought a *Scire fac.* to repeal a patent, and the writ was *unde nobis supplicavit.*

Object. The king may maintain this *Scire fac.* because it is in *deceptionem Dom. Regis.*

* *Resp.* Admit that it is, yet no deceit will be sufficient * P. 156.
ground for any such writ, if it be not to his damage, or to the damage of his people.

2. The king here is not deceived, because he recites the will, and yet goes contrary to it, which is according to his prerogative; and there is a difference where the king takes notice of the estate of the testator, and where he hath not notice, but only by the suggestion of the party.

To the second point. Such *Scire facias* doth not lie at the suit of a subject, for two reasons. 1. Because although the king may bring a *Scire facias* in chancery to repeal a patent; yet when a subject repeals a patent of another, not upon privy but grievance, there it ought to be repealed in parliament. *Hill. 16 E. 3. Fitzh. Brief. 651. Mich. 21 E. 3. 46. b. pl. 65.* It ought to be grounded on matter of record, and not upon suggestion of matter of fact only. If the king grants two patents of the same thing, the second patentee cannot have a *Scire facias* against the first. *Mich. 7 E. 4. 22. b. by Catesby, Dyer 176, 277. a. pl. 54.* Where the title of a subject appears upon record, there he may have a *Scire facias*, otherwise not. *11 H. 4. 67. Fitzh. Scire fac. 70. 12 R. 2. Fitzh. Forfeiture 20. 41 Affise, pl. 25. Fitzh. Scire fac. 133. Pasch. 49 E. 3. 11. Fitz. Traverse 19.*

To the third point. A *Scire facias* doth not lie to repeal part of a patent. Letters patent may be void in part, and good in part, but they cannot be repealed in part; 1. Because the record of the patent is intire. 2. The form of the entry of the judgment in a *Scire facias* to repeal a patent, is *quod literæ Patentis vacentur*, and not part of them. *Dyer 197.* In the prince's case they are repealed *quoad Maneria, &c.* but it doth not appear there were other lands. And there is a difference between a *Scire facias* and a *Quo Warranto*, for a *Quo Warranto* may be good for part, and ill for another part, because the record is not to be touched by it; but upon a *Scire facias* the record is to

Term. Trin. 18 Car. 2. B. R.

be cancelled. 5 R. 2. Rot. *Parliamenti* 89. the case of *Laystiffe*. Reversal of records in part, Cro. Jac. 303. *King* versus *Marborough*, and *Croker* in *Ejection* against an *Infant* and others, reversed against all. Hill. 1653. B. R. *Symonds* versus *Bockle*.

* P. 157. * *Object.* *English's* case. Where a fine is reversed quoad an infant, and good for the other, and F. N. B. 98. b. Fine of lands in ancient demesne, and at common law, reversed as to the lands in ancient demesne, and stood as to the others.

Resp. Upon the *Book of Entries* appears a rational difference; for if a fine be reversed, generally the writ issues to the *Custos Brevium* to cancel the fine. *Coke's Entries* 252. *Gage's* case. *Rastal's Entries* 278. a. But when there is a reversal as to part, there is no such writ. *Coke's Entries* 257. b. *Peirs* and *Parmiter's* case. So a fine may be reversed in part, but not cancelled in part; And as to the case of ancient demesne the fine may be reversed by writ of deceit; but the judgment is only *quod Dominus rehabeat Curiam suam*. *Rastal's Entries* 100. b. 7 H. 4. 44. *Countess of Kent's* case. In case of an obligation for performance of covenants, the obligation may be good for part, and not good for the other part; but the obligation cannot be cancelled for part, and stand good for another part; and here the judgment ought to be *quod Literæ Patentes conculentur*. There are precedents in point, *Pasch.* 27 Eliz. *Privit* versus *Ward*. In a *Scire facias* to reverse a patent for a walk in *Cranburn* chase; the judgment ought to be given in B. R. when the record is brought there to try the issue, but judgment was not given. 28 Eliz. The countess of *Bath* brought a *Scire facias* to repeal a patent for a market; *Vide* such a *Scire facias*, *Mich.* 11 H. 4. 5. pl. 13.

Object. Then all the patent is to be repealed if any part be defective.

Resp. It cannot be repealed upon this writ. 2. Then the whole corporation is dissolved, and all the revenue returns to the defendant.

To the fourth point. This patent is good in the whole, because although the king takes notice of the will of *Robert*, yet he is not tied to pursue those rules in the erection of the college prescribed in the said will, because a corporation is a creature of the king. 11 H. 7. 27. b. and 28. 21 E. 4. 7. a. by *Choke*. 2. *Ab inconvenienti*, if any variance will destroy corporations, *Sutton's* hospital and the school of

Term. Trin. 18 Car. 2. B. R.

of *Sevenock* in *Kent*, and many others would be destroyed.

3. I will go over the desire of this writ of *Scire facias*.

* *To the fifth point.* It is not fit to repeal this patent at * P. 158. this time, because the court will not repeal the patent without calling the guardians and assistants of the hospital; and here they are not parties. *Keilway* 194. *Sir John Savage's* case.

Maynard serjeant *contra*, and it was adjourned. See after 177.

Jemot versus Cooley. See before 135.

IN ejectment of the demise of *sir Ralph Bovey*. Upon Estate:
Not guilty the jury found a special verdict. *Francis* 3 *Danv. Abr.*
Drake seised in fee of the land in question, in consideration 163, p. 4.
of 6000*l.* grants a rent-charge of 420*l.* per annum to *sir* 1 *Sid.* 223,
Ralph Bovey and his heirs, and in the deed of grant is this 262, 344.
clause; And the said *Drake* doth covenant and grant to the 1 *Lev.* 170.
said *sir Ralph Bovey*, that if the rent be arrear above twenty 1 *Saund.* 112.
days after any day of payment, that then the said *sir Ralph* 2 *Vent.* 193.
Bovey and his heirs, &c. may enter into the lands and receive 1 *Keb.* 784,
the profits until he shall be satisfied of the arrears; the rent is 915.
behind, and *Bovey* enters and makes a lease to the plaintiff; 1 *Keb.* 20,
and if *Bovey* hath such an interest as he may maintain an 184, 270,
ejectment, was the question. 295.
3 *Keb.* 6.

Morton justice for the plaintiff. Here an inheritance passes, and not a chattel, and the rent is the principal, and the power to enter is a farther remedy, *Littleton* sect. 327. it is more than a penalty. For *Cro. Jac.* 511. *Hare* versus *Havergil*. This grant is in the nature of a common assu- rance, and therefore ought to be favoured; and it is of more antiquity than a common recovery. 19 *E.* 3. *Fitz.* Bar. 280. 13 *R.* 2. *Fitz.* Done 10. Authority in point, *Hill.* 13 *Jac.* C. B. Rot. 868. *Brown* versus *Hagger*, cited in *Price* and *Vaughan's* case; and *Trin.* 14 *Car.* 2. Rot. 2511. *C. B.* *Eger* versus *Malin*. Ejectment upon a lease of the lord *Byron*. Special verdict was found; *sir John Byron* seised in fee, by indenture grants a rent-charge for life to commence after the death of the grantor; and if the rent be arrear, that the grantee may enter and take the profits without account till the rent and arrears shall be paid; the rent was arrear, and the grantee enters and makes a lease to the plaintiff.

* And by *Bridgman* chief justice, There is not more dif- * P. 159.
ference betwixt a grant and feoffment, than betwixt one
L 2 egg

Term. Hill. 18 & 19 Car. 2. B. R.

egg and another; and the justices agreed for the plaintiff there, besides *Brown* justice.

Wyndham justice accordingly. Here the thing granted is only a power, and not the term it self, and it is as a distress; but this power produces a real effect, when the grantee hath entered he hath only a pernancy of the profits; for he cannot cut trees, or pull down houses, and if he doth, trespass lies against him, as against him who abuses a distress; this power goes to the heir, but the inheritance subsequent goes to the executors, and follows the arrears of rent.

Twisden justice, and *Kelyng* chief justice accordingly; and judgment was given for the plaintiff.

* P. 160. * Term. Hill. 18 & 19 Car. 2. B. R.

Rymes versus Baker.

Covenant.
2 Keb. 139.

IN covenant. The plaintiff counts that he demised to the defendant certain land for thirteen years, to pay to him 40*l.* quarterly, and doth not say *annuatim*. The defendant pleads *Non est factum*, and found for the plaintiff, and after plea pleaded, the plaintiff amended his declaration, and inserted the word *annuatim*.

And *Powis* moved for the defendant, that it should be examined.

But by *Kelyng* chief justice, and *Wyndham* justice, The addition of *annuatim* is no more than what was implied before.

And by *Twisden* justice. The defendant ought to have demanded oyer of the deed, and now he having pleaded *Non est factum* he is not prejudiced by the amendment; and therefore let the amendment stand.

Presentment.
2 Keb. 130.

Ayres was presented at the leet for digging cony-boroughs, and breaking the soil in the waste.

Winnington moved to quash it, because it is not *ad Communitatem*. *Cro. Jac.* 156. *Leicester Forest's* case. 27 *Aff.* pl. 6.

Kelyng chief justice. A leet cannot amerce for things done to the damage of the lord; and the presentment was quashed.

Term.

Bilton *versus* Johnson and others.

TRESPASS and false imprisonment in London. The defendant pleads that J. S. sued forth a writ of *Latitat* the last day of *Trinity* term, directed to the sheriff of R. and by virtue of that the sheriff of the said county made a warrant to the defendant, and he upon that took the plaintiff, which is the same imprisonment, *absq; hoc*, that he is guilty in London, *vel aliter vel alio modo*. And the plaintiff replies, that the said writ was truly prosecuted after the imprisonment, (*viz.*) the 9th of *August*. And upon this the defendant demurs; and adjudged for the plaintiff, because although the *Tesse* of the writ is upon record, and the plaintiff cannot aver against it; yet here great inconveniences will be, if the plaintiff cannot set forth the very time of the purchase of the writ, and the relation of the *Tesse* is only to prevent fraud, and not justify a *Tort*; and judgment was given for the plaintiff.

False Imprisonment.

2 Keb. 173, 198.

Sid. 271. Bailly *ver.* Bunning.

The sheriff returns a rescous against *Syms*, and others; and the return is, that A. being in custody of my bailiffs, the defendant rescued him out of the custody of the bailiffs; and *Stroud* moved to quash it, because it ought to be out of the custody of the sheriff.

Rescous.

1 Lev. 214.

Twisden justice. This hath been ruled both ways, for it is good, *e custodia mea secundum veritatem Legis*, and good *e custodia Ballivi mei secundum veritatem facti*; And if an action of the case be brought for the rescous, it ought to be, that he returned the prisoner being *in custodia Ballivi*; but the other justices ruled that it ought to be *ex custodia Vicecomitis*, and upon that the return was quashed.

Hill. 39 H. 6, 40. b. pl. 4.

Knight *versus* Buckley.

Debt.
2 Danv. Abr.
486. p. 9.
1 Lev. 215.
1 Sid. 338.
2 Keb. 260,
277.

DEBT for rent by the assignee of a reversion. The defendant pleads, That before any rent arrear he had assigned to another. The plaintiff demurs; and adjudged for the plaintiff, by *Kelyng* and *Wyndham*, contrary to the opinion of *Twisden*; because the defendant doth not alledge that he gave notice to the reversioner of this assignment. *Vide Cro. Eliz. 22. Serjeant and Gibson's case.*

This term proclamation was made in court for the county of *Middlesex*, for the rates and prices of hostlers, viz. hay for a night and day for one horse 9d. with litter; hay for one day 4d. For one horse without hay 2d. oats 8d. by the peck, and not more.

* Snow *versus* Cutler. See before.

Devise.
2 Danv. Abr.
520. p. 16.
Eq. Ab. 188,
p. 10.
1 Lev. 135.
1 Sid. 153.
1 Keb. 567.
752, 800, 851.
2 Keb. 11,
145, 296.

IN ejedment of the demise of *Henry Chomeley* of lands in *Hackney*. A special verdict found, that *Sarah* the wife seised in fee of a copyhold, surrenders to the use of her self, and *Robert Jaques* her husband, and the heirs of the husband; the husband after surrenders to the use of his will, and makes his will, and by this devises his land in these words; *My lands in Hackney which were my wife's, and now her's for life, I give to the heirs of the body of my said wife, if that he or they live till fourteen years of age; and for want of such heirs, then to William Jacob and his heirs.* 10 August, 1 Car. 1. *Robert Jaques* dies, *Sarah* survives and marries *Henry Chomeley*, by whom she had issue the lessor of the plaintiff. *Henry Chomeley* suffers a recovery, 20 Febr. 15 Car. 2. *Sarah* dies, and the lessor of the plaintiff enters and the heir of *Robert Jaques*, the devisor, enters upon him.

* P. 163. * The points were two, viz. 1. What passes by the will.
2. What operation the recovery hath.

Moreton

Term. Mich. 19 Car. 2. B. R.

Moreton justice. 1st, If this devise of the remainder in fee be good to the heirs of the body of the wife, by way of executory devise. 2. If the recovery be a good bar to the executory devise.

As to the second point he did not meddle; but as to the first, he held it is a void devise. Conveyances at common law are good directions for wills. 1 Co. 85. *Perkins* 97. There ought to be a devisee, as well as a devisor in *rerum natura* and in *Esse* at the time of the devise. 2 H. 7. 13. 9 H. 6. 23. *Moor* 637. To an infant in *ventre sa mere*. *Dyer* 303. *Trin.* 16 Car. 2. C. B. *Woodley* versus *Nightingale*. There was a good executory devise, but not better for being a surrender. *Cro. Eliz.* *Clamp's* case.

Objec^t. It passes by way of reversion, and the inheritance descends in the mean time.

Resp. It cannot, because there is a remainder over. 9 H. 6. A use to a monk, the remainder to J. S. and his heirs, the remainder vests immediately, and cannot pass as an executory devise, because there ought to be such manifest intent, and not by averment. *Shelton* versus *Bine*, *Pasch.* 17 Car. 2. A devise of land to one after the death of J. S. is a present devise; and a devise to the first son of J. S. when he is born, is void without an estate of freehold precedent.

Wyndham justice accords with *Moreton* justice. The questions are:

1. If the devise to the heirs of J. S. (he being then alive) be good?

2. The feme here having an estate for life, if this alter the case?

3. If the recital here alter the case?

4. If the words (*viz.*) *If he live to fourteen years*, alter the case?

As to the 1st, It is a ground, that judges ought to keep within bounds: and it is said, that if *Matthew Manning's* case had been to be adjudged now, it would have been otherwise determined. A devise to the heirs of J. S. he being alive, is a void devise. Power to make leases to one, two or three persons, he cannot make a lease for the life of the first son of J. S. because the person ought to be in *Esse*, per *Noy* attorney general.

As to the 2^d. The estate for life of the wife doth not alter the case. 40 E. 3. 9. *Beverly's* case. A lease for the life of A. remainder to his right heirs, A. hath an estate in fee presently.

* To the 3^d. The recital doth not alter the case, because in no case where there is a present devise there shall not

Term. Hill. 19 & 20 Car. 2. B. R.

not be a contingent executory devise; *Wild's* case expresses in the point.

Object. Devise to an infant *in ventre sa mere* is good.

Resp. The greater opinion is, that such devise is void; yet an infant *in ventre sa mere* is *in Esse*, and may be vouched; the earl of *Bedford's* case.

To the 4th. It is a contingent upon a contingent.

Twisden justice *contra*. It is a good devise to the heirs of *Sarah*; and he took a difference between acts executed, and devises, because a devise may be *in futura*; as a devise to *J. S.* when he marries such a one, there no estate vests in him till marriage. 11 H. 7. 17. As to the devise to an infant *in ventre sa mere*, 11 H. 7. 13. it is frequent. *Moor* 177. *Dyer* 342. This is a contingent pursuant to the course of nature.

To the 2^d point of the recovery it works nothing, because copyhold and a recovery of a copyhold doth not dock the remainder without custom.

Kelyng chief justice agreed with *Twisden*, and so the court was divided.

* P. 165. * Term. Hill. 19 & 20 Car. 2. B. R.

John Pemble *versus* Sterne.

Intr. Hill. 16 & 17 Car. 2. Rot. 1521.

Estate.

2 Danv. Ab.

752. p. 5.

3 Danv. Abr.

244. p. 2.

1 Lev. 212.

1 Sid. 316,

416.

2 Keb. 213,

230, 325, 440,

460, 464, 464,

525.

ON an ejectment a special verdict found, that the lands in question were parcel of the inheritance of the archbishop of *York*, and usually and anciently demised by lease. For 12 Decemb. 1604. the archbishop of *York* on surrender of a former lease demises this to *Robert Nevil* for 21 years under the old rent. *Nevil* surrenders this in the year 1630. to *Harsnet* archbishop, *ea intentione* to preserve this land for the maintenance of his successor; the archbishop enters, and dies 1631. after whose death *Neal* was made archbishop,

Term. Hill. 19 & 20 Car. 2. B. R.

archbishop, who died in 1641. and *William* was made archbishop, during all which time the land was in the hands of the archbishops. In 1642. an ordinance was made for sequestering the lands of the church; and after (*viz.*) in 1646. there was a sale of the lands of the church; *Williams* dies 1646. and after (*viz.*) in 1660. *Fruyn* was made archbishop, who made a lease for 21 years to the lessor of the plaintiff; *Fruyn* dies, and *Stern* is made archbishop, who demises the land to the defendant.

The question is, If this lease made by *Fruyn* be good?

Moreton justice for the defendant. Because the verdict is insufficient and void: 1. Because here is a demise of divers things, and the verdict finds only for part, and nothing for the residue. 30 E. 3. 33. 1 *Inst.* 227. a. 2. The jury finds that the lands in question are part of the inheritance of the church of *York*, and commonly demised, and doth not say for what time, which ought to be for the greater part of 20 years.

As to the matter in law, the lease is not good by 32 H. 8. And to this point it is to be considered, what the law was before this statute: The bishop could not by himself do any prejudice to the church, he could not disclaim, release, grant an annuity. 1 *Inst.* 102. He might grant the inheritance with * the confirmation of the dean and chapter; and before the third council of *Nice*. 710. without such consent, receipt of rent by the successor would bind him. In this statute the proviso is considerable; the statute doth not mention bishops, and the greater mischief is of tenants in tail; and this statute aimed at the benefit of the successor; leases ought to be in the form there prescribed. *Bridgman's Rep.* the bishop of *Chichester* and *Freedland's* case. Here was 32 years without any demise, but kept in demesne; and it ought to be demised within eleven years before. 1 *Inst.* 44. *Cro. Eliz.* 707.

If the temporalities continue twenty years in the hands of the king, this doth not hinder the demise, because the king cannot charge the church.

A bishop is not compellable to demise his lands, no more than another lord of copyhold. If tenant in tail make a lease for 21 years, which expires, and then the land continues twelve years undemised, and tenant in tail dies, his issue cannot demise this land by the statute.

Wyndham justice for the defendant. He took the like exception to the verdict which *Moreton* took; and as to the matter in law, this part of the proviso ought to be as strictly observed as any other part of it. Sequestration doth

According to this opinion is *Palmer's* Rep. 176: the Bishop of *Oxford's* case.

doth not hinder the demise; but if it be in the king's hands it is a great doubt, and this statute being an enabling law, implies a strong negative, that it shall not be otherwise, being an introductive law. For authorities, the case of *Cro. Eliz.* is a stronger case, *Cro. Eliz.* 708. *Mallet* versus *Mallet*, and sir *John Marvin's* case in *Harpur's Rep.*

Twisden justice for the plaintiff. As to the exception to the verdict, the first he allowed, but not the latter. As to the matter in law; in this statute there is an enacting part and a restrictive part; this case is of a new nature, and never brought in question before.

Here it is to be inquired, 1. If land be kept in the hands of the bishop, if it may be after demised by the successor?

2. If the lessee surrenders, and the bishop keeps the land?

3. It was demised here in 1604. and *Octob.* 1630. surrendered to *Harsnet*, and it was not for eleven years together in the hands of any bishop.

The statute extends directly, and not obliquely to bishops. Here is a shell and a kernel, words and meaning. Space, and term of twenty years is not all one here. The preamble is the key for reformation thereof, &c. which implies a mischief before. They were to pay first-fruits, and yet they could not * raise money without the chapter, who would have money also to consent. The meaning arises from the time of making the statute, where many lands were which never were demised, as palaces. But those which were then demised, and had gained a customable rent, the successor could not divest this power after by not demising it. The act doth not force bishops to keep lands in their hands. A bishop makes a lease of a reversion of a copyhold, it is a demise within this statute. 6 Co. 39. *Moor* 719. A demise for years of tithes is good within this statute, *Denton's* case. As to *Mallet* and *Mallet's* case, the chief gist of that case was concerning the comprize of lands by the name of a manor. Whatsoever comes within the body of the act ought to be averred, but not when it comes in by the proviso. *Plowd.* 376. As to *Scrog's* case, *Cro. Eliz.* that makes nothing to this case. And as to the case in *Harpur's Reports*, it is only, *Nota, dictum fuit per Catlin* and his companions.

As to the 2d. If a bishop make a lease for years, and the lessee surrenders, and the bishop keeps the land in his hands, as long as the lease hath existence, the successor notwithstanding may demise the land. 1. Because the lease hath existence to some purpose, 9 E. 4. 18. and the lord

Abergaveny's

Term. Hill. 19 & 20 Car. 2. B. R.

Abergavenny's and *Davenport's* case, 8 Co. 140. *Litt. sect.* 636. and this case is not like the case of a fine.

If the words (*most commonly*) extend to eleven years, these mischiefs will ensue on such construction: In case of tenant in tail he takes a wife and dies, the feme lives above eleven years, and hath this land in her hands: So of an infant tenant in tail. *Dyer* 271. and *Ninian Menwile's* case. 26 *Eliz. Haines* versus *Holland*, *Shute's Rep.* Cox bishop of *Ely's* case. No lease questioned, although the bishoprick was in the hands of the queen for twenty years.

Kelyng chief justice for the plaintiff. He agreed that the first exception to the verdict is good; but as to the point in law he concluded for the plaintiff. A bishop makes a lease for one and twenty years of lands never demised, and dies, the king keeps it in his hands. *Dyer* 261. As to the twenty years before this lease made, seventeen years of it the land was in the hands of a disseisor. Statutes are to be construed according to the design of the makers of them. *Plowd.* 106. *Fulmerston Sherrard*, *Magna Charta*, cap. 11. *F. Br.* 661. *Marlb.* cap. 4. Literal interpretations are not necessary. *Grotius de Jure Belli & Pacis.* Page 30. The design of this statute was for the benefit of the lessees in one degree, and for the * bishop in another; it was to avoid long leases, and in reversion, and the ancient rent ought to be reserved. If this statute shall be construed for the defendant these inconveniencies will ensue. * P. 168.

1. A lease expires, and then the bishop is disseised for twelve years, then he recovers. The drift of the statute was only to restrain the demises of ancient palaces and demesnes, and not other things.

2. It shall be in the power of a bishop to repeal this statute.

In the proviso are two clauses of qualification, viz. Let to farm. 2. Or occupied by farmers by the space of twenty years; the words *by the space of twenty years* extend only to the second part of the disjunctive, and not to *let to farm*. And this hath been the exposition of this statute in the case of the bishops of *Winchester* and *London* for their houses lately. And as to the cases of *Mallet* and *Mallet*, and *Scrog's* case, they are not to the purpose; and so he concluded for the plaintiff. And for that the court was divided, no judgment was given. But the cause was adjourned. *Et sic pendet.*

Term.

* P. 169.

* Term. Mich. 20 Car. 2. B. R.

Barker *versus* Durrant

Award.

DEBT upon an obligation to perform an arbitrament. Upon no arbitrament pleaded, the plaintiff replies and sets forth the award, which consisted of two parts (amongst others) To which exception was taken (*viz.*)
1. That the defendant shall make a release to the plaintiff until the time of the arbitrament, and then the bond of the submission is discharged. But it was not allowed, because divers things are to be done together, and if all had been done the release shall be no prejudice; and so it differs from the case where money is to be paid after the release is to be given. 2. The award was in part of satisfaction, which is not good. *Mich. 45 E. 3. 16. a. pl. 18. and Trin. 1653. B. R. Penros versus Tubb. Sed non allocatur*, because it is *tant. existen' partem redditus*, which is only a description when he will pay it, and not by way of discharge of rent in controversy: And judgment was for the plaintiff.

Smedly *versus* Heap.

Words.

¹ Lev. 250.

² Keb. 404.

THE plaintiff declares, that he is a mercer, and the defendant said to him these words, *viz. Thou art a cheating knave and a rogue*. On Not guilty, verdi& for the plaintiff.

And *Bigland* moved in arrest of judgment, because there was not any communication by the defendant of the trade of the plaintiff: And therefore stay, &c.

* P. 170.

* Taylor *versus* Brown.

Prohibition.

¹ Vent. 5.

Clift's Entries

13.

A PROHIBITION was granted to the ecclesiastical court, because they refused to deliver a copy of the articles; and the rule was, that a prohibition go until they deliver such a copy, and the writ of prohibition was absolute without a *quousque*.

And

Term. Mich. 20 Car. 2. B. R.

And *Linley* moved for a consultation; but the court would not grant a consultation, but a *Superfedeas*; and farther resolved that the statute of 2 H. 5. cap. 3. extends where the proceeding in the ecclesiastical court is *ex Officio*, as well as betwixt party and party; and the report of *Moor* 756. is ill reported; for *Cro. Jac.* 37. is contrary, and that a prohibition lies for not delivering the copy of a libel in such case.

Information against *Buckworth* and others for perjury, in Perjury. ejection. The defendants justify; upon Not guilty, and ^{1 Sid. 377.} now upon evidence to prove the perjury, one was produced ^{2 Keb. 403.} to prove what one, that is since dead, swore upon the first trial.

And by *Kelyng* chief justice, It shall not be allowed, because betwixt other parties.

But *Twisden* and *Morton contra.* And it was allowed.

Ward *versus* Culppeper.

REPLEVIN. The defendant avows for a rent-charge. Inquiry. The plaintiff pleads in bar *Non concessit*; and upon ^{1 Vent. 40.} this issue is taken according to the statute of 17 Car. 2. c. 7. ^{1 Lev. 255.} And the jury found the value of the cattle, but not the ^{1 Sid. 380.} arrears. ^{2 Keb. 409, 431, 536.}

And *Winnington* moved in arrest of judgment upon the said verdict; because perhaps there are only 20*l.* arrear, and the value of the cattle are 50*l.* And the court ruled that judgment shall not be entered upon this finding, but the avowant may have judgment at common law, if he will, and then the plaintiff is put to a second deliverance.

* *Rumsey versus Rawson.*

* P. 171.

IN replevin. The defendant avows as a commoner for Common. taking goods damage-feasant *in loco in quo*, &c. The ^{1 Vent. 18,} plaintiff pleads in bar of the said avowry, that the parson ^{25.} of *Dale* is seised of such glebe land, and that he had com- ^{2 Keb. 410,} mon *in loco in quo*, &c. for two hundred sheep levant and ^{493, 504.} couchant upon the same glebe land, and that the plaintiff by the licence of the said parson put in his cattle, and issue is taken upon the levant and couchant, and found for the plaintiff.

And serjeant *Maynard* moved in arrest of judgment for the avowant, because licence cannot be given by a commoner to put in the cattle of a stranger, and here the plaintiff

Term. Mich. 20 Car. 2. B. R.

plaintiff was only a trespasser upon the parson, and such licence cannot be without deed, 2 Cro. 574. *Monk versus Butler*: And stay until, &c.

Return.
1 Sid. 407.
2 Keb. 410,
464.
Vide ante,
fo. 81.
Long *versus*
Emot, eject-
ment in B. R.
of lands in
Lancashire.
See after fo.
206. Draper
and Balie's.

Needham *versus* Bennet.

UPON a judgment in B. R. a *Fieri facias* issued (af-
ter a *Teslatum*) to the sheriff of *Chester*, who returns
quod fieri fecit the goods, but that they remain in his hands
pro defectu Emptor, and upon that a *Venditioni exponas* is-
sues to him, of the which he doth make no return, nor
gives satisfaction to the plaintiff; and upon this he moves
for an attachment.

And *Williams* moved to stay the attachment, because a
Fieri Facias cannot issue out of this court to the county
palatine of *Chester*, and made a difference betwixt a judg-
ment originally given in this court, and when a judgment
is removed hither by writ of error; in the second case it
lies, but not in the first. Mich. 21 H. 7. 33. pl. 32. Judg-
ment in *Callais* or *Wales* cannot be here reformed, because
not parcel of the realm, otherwise of *Lancaster*; *Sed non*
allocatur, and an attachment was granted.

* P. 172.

* Danby *versus* Palmes.

Estrepement.
1 Sid. 369.
2 Keb. 376,
381, 413,
580.

A WRIT of error to reverse a judgment given in
C. B. in a writ of partition upon a *Nihil dicit*, of
divers manors, and view of frankpledge, and free warren,
and other things of great value. Upon *In nullo est erratum*
pleaded, the counsel for the plaintiff in the writ of error
assigned divers errors, some in form, and others in the
substance of the proceedings.

And as to the form *Coleman* shews, 1. The executory
judgment is *quod partitio facta*. and not *fit*, or *fiat*, and so
not sense. 2. The precept to the sheriff after the execu-
tory judgment is *quod per sacramentum proborum hominum in*
Comitatu, &c. and doth not say, *de Comitatu*. 3. Here is a
discontinuance, because there is not any continuance for
the tenant *per idem dies*, when the partition shall be made.

The errors in substance are: 1. No mention is of the
view of frankpledge, and yet in the writ is mention of the
view of frankpledge, not as appurtenant to the manors,
but distinct; and here is not any mention of it in the par-
tition; and *cum pertinentiis* shall not supply it. 2. The she-
riff returns *unam medietatem eorundem*, (*viz.* the premisses
before

Term. Mich. 20 Car. 2. B. R.

before) to be delivered to *Danby*, viz. such manors *per parcella medietatis suæ*, and other manors to *Palmes*, and then again, *alteram medietatem* to *Danby* again, and so *Danby* hath two moieties. 3. The sheriff delivers *quartam partem* of such a thing, and doth not say *per metas & bundas*; and if the parties have a fourth part, then the writ ought to be so. 4. The sheriff divides the rents without shewing which (viz.) copy or free, or upon leases for lives, years or at will. 5. The sheriff delivers to *Danby* and *Margaret* his wife, whereas it appears upon the writ, that *Danby* was only seised in the right of his wife, and now by this delivery he hath an interest in his own right. *Sed non allocatur per Curiam*. 6. By *Offly* upon the return of the sheriff he doth not conclude that those are all the lands comprehended within the writ to him directed, as it is in *Co. Entr.* 412. a. pl. 2. and by *Weston*. 7. The demand is of 400 acres of wood, and no mention of that in the partition, but only of a park *una cum omnibus arboribus eidem pertinent*, which is not the wood here. 8. Divers things are delivered in the partition, which are not demanded or mentioned in the writ, and yet the writ of * partition lies of them, viz. * P. 173. pasture for six beasts, *Shopas*, &c. 9. The sheriff delivers three acres of meadow lying in the meadow of *Middlefield*, excepting *duobus rodīs*, and there is not any disposal of those two rods after or before. 10. The writ is that the sheriff shall go to the advowson, which cannot be, because it is incorporeal. *Et adjournatur*.

Crispe versus Mayor and Commonalty of Berwick.

Trin. 20 Car. 2.

ON covenant upon an indenture the plaintiff counts Trial.
that the defendants at *York* demised to him certain
messuages in *Berwick*, for years; and that they covenanted
that they had power to demise them, and that the plaintiff
should enjoy them quietly, and assigns a breach, that such a
one entered upon him and ejected him out of the said messu-
ages. The defendants plead that the strangers did not enter
upon the possession of the plaintiff; and upon this issue is
joined, and a suggestion is made upon the roll, that the king's
writ doth not run in *Berwick*, and therefore that the *Venire*
Fac. shall be of the next vill to *Berwick*, which is *Belfort*;
and upon this a *Venire Fac.* is directed to the sheriff of *Nor-*
thumberland to make to come twelve out of *Belfort* to try
this issue, and the jury found for the plaintiff.

And

Term. Mich. 20 Car. 2. B. R.

And now *Stote* for the defendant moved in arrest of judgment, that this trial is not good, because *Berwick* being out of the realm, the trial ought to be where the action is brought, viz. at *York*, and not at *Belfort*. And there is a difference betwixt a county palatine, which is part of the realm, as *Lancaster*, *Chester* and *Durham*, and *Wales*, which is not part of the realm, and *Berwick* here, *Fitzh. Trial. 4. Kelw. 202. a. pl. 19. Mich. 18 Eliz. C. B. Christmas's case.* Appeal doth not lie in *B. R.* for the murder of a man in *Berwick*.

Object. There will be failer of justice, because the defendants are judges.

Resp. The law of *England* doth not take consuance of that which is out of its jurisdiction; and *Berwick* is not part of *England. 7 Co. Calvin's case, 23. b.* And by the same reason that such trial shall be of a thing in *Berwick*, it shall be in *Ireland, &c.* And the privileges of *Berwick* are confirmed by *Alexander* king of *Scotland*, and *42 Eliz. C. B. Rot. 630. Shepardson versus Chambers*, In debt upon an obligation conditioned * to pay money in *Berwick*, was tried at *Belfort*, but then the action was laid there.

* P. 174.

Shafto for the plaintiff. Here would be a failer of justice, *Mich. 19 H. 6. 12. b. pl. 31. per Askue*, A thing done in *Wales* shall at common law be tried in the next county adjoining, and there no mention is made of it, which *Fitzh.* in the abridgment of this case mentions *tit. Trial 4.* a more strong case of a thing in *Ireland* tried in the county of *Salop*, which is alledged to be the next county to *Ireland. 2 Roll. 597. pl. 8. Barnwel versus Rotchford*, and a writ of error lies to *Berwick* or *Callais, 4 Inst. 282.* and there is a like suggestion for *York, Dyer 279. b. pl. 10. Moor 581. pl. 796. 8 Co. 125. a.* Lands in *Wales* are pleadable here. *Fitzh. tit. Jurisdiction 34.* and *Scotland, Br. 551.* and *12 H. 4. 16. pro Normandy.*

Cro. Eliz.
465. Waller
versus Davies.

Wyndham justice. It ought to be tried in *York*, where the action is brought as *Co. Dowdale's case* is. And adjourned; and after resolved for the plaintiff in this point.

This vacation died sir *Wadham Wyndham* knight, one of the justices of the *King's Bench*, and of the county of *Somerset*, who was a good and prudent man.

Term.

Watson *versus* Baker. Error, B. R.

IN debt upon an obligation. The condition being that the defendant being parson of *A.* should resign upon request. The defendant pleads that he did resign according to the condition, and found against him, and judgment for the plaintiff; and now brought a writ of error because a simoniacal condition: But judgment was affirmed, because the condition is good.

Condition;
2 Danv. Abr.
18. p. 1.
1 Sid. 387.
2 Keb. 446.

This term in the place of justice *Wyndham* came baron *Rainsford*, who being a baron, before that *Morton* was judge, was now made the third justice of this court, and took place of *Morton*.

Salmon *versus* Smith.

IN debt for rent. The plaintiff counts of a demise of four rooms. The defendant pleads, that as to part *Actio non*, because the plaintiff demised to him the said four rooms; and also another room into which the plaintiff entered before any rent due, and is in possession of it. The plaintiff demurs, because the defendant doth not traverse the demise by the plaintiff set forth in his count.

Pleading.
1 Lev. 263.
1 Saund. 206.
1 Sid. 405.
2 Keb. 467,
470.

Sanders for the defendant. And he cited *Mich. 5 E. 4. 8. pl. 19.* where such a case is cited without a traverse. But judgment was given for the plaintiff by the whole court, because the plea doth not answer to the count, nor is it *ad idem*, *Mich. 32 H. 6. 3. b. pl. 1.* and *Mich. 35 H. 6. 38. a. pl. 47.* and the pleading in the case of *Dyer 32. b. pl. 7.* is not controverted; and this case is resolved, 1 *Leon. 43. Kempton and Bellamy*, and so are all the precedents.

Sir John Kelyng, Chief Justice.

Twisden,
Rainsford and } Justices.
Morton,

Skinner *versus* Gunton, Lyon, and others.

Cafe.
1 Danv. Ab.
298. p. 5.
213. p. 3.
1 Vent. 12,
18, 19.
1 Saund. 228.
2 Keb. 473,
476, 497.
3 Keb. 118.

IN an action upon the cafe. The plaintiff declares, that the defendants, with others, conspired together to arrest the plaintiff in a grand action in London, and took out a plaint in the sheriffs court there, of 300*l.* with an intent that the plaintiff should not find bail; and upon this the plaintiff was arrested, and was compelled to continue in prison twenty days and nights, *ad damnum* of 100*l.* Upon Not guilty, one only was found guilty.

And *Sanders* for the defendant moved in arrest of judgment. 1. Because the plaintiff doth not shew that there was any end or determination of that suit, which ought to be shewn. 2. It is an action of conspiracy, which doth not lie against one only.

Pemberton for the plaintiff. The complaint is only of an arrest, and not any other proceeding as joint, &c. And as to the 2*d*, It is only an action upon the cafe. *F. N. B.* 116. *a.* And before the statute *de Conspiratoribus* made 33 *E. 1.* page 89. an action of conspiracy doth not lie for any thing, besides for indicting for felony or treason; but by this statute it lies for trespass, and so against one only. *Trin. 11 H. 7. 25. pl. 7.* And this action is only an action upon the cafe in the nature of a conspiracy. *Cro. Eliz. 701. Marsh against Vaughan.* And judgment was given by the whole court for the plaintiff.

Apprentice.
2 Keb. 480.
Term. 465.

The town of *Nettingham* impose by order of the fellows an apprentice upon one Mr. *Selwin*, and he moved by *Bigland* for a *Certiorari* to remove this order, with an intent
to

Term. Pasch. 21 Car. 2. B. R.

* to quash it, because the statute of 39 Eliz. cap. 2. doth * P. 177.
not compel any to take an apprentice.

Kelyng chief justice. The validity of this clause is to be tried in an action.

Twisden justice. It hath been an opinion, that a man cannot be constrained to take an apprentice; but of late time it hath been held otherwise.

Kelyng chief justice. It was held in king *Charles* the 1st's, That an apprentice might be imposed; and so it was given in charge by the lord keeper in the star-chamber; and there is no inconvenience, because the master may assign the apprentice over.

Twisden justice. If the apprentice may be imposed, it will be hard for merchants in *London*, &c.

Morton justice. It was always ruled by *Dampart* chief baron, in his circuit, to confirm such orders. See this case before.

The Case of Sackville College. See before in Chancery.

TWISDEN justice for the plaintiff. The questions in this case are three. 1. If these grants are repealable, and are void? 2. If this be an apt *Scire facias*, being to repeal part of a patent? 3. If this writ may conclude to the exheredation of the heirs? Scire facias.
Antea 154.

As to the first. These letters patent to *Edward* earl of *Dorset*, and his heirs male, are void, and ought to be repealed, and may be repealed though void. *Hill*. 12 H. 7. *Kelw.* 19. a. by *Keble*. And that these letters patent are void, appears, 1. Because they are contrary to the intention of the king. *Hob.* 223. *Anne Needler's case*. 10 Co. 110. b. *Vowe's case*. 2. The king cannot deprive the patron of those rights which are appendant to him, which is *jus Patronagii*, & *jus visitandi*, which are in earl *Robert* and his heirs.

As to the second. This grant may be repealed in part. 9 Co. 28. a. *Dyer* 276. b. pl. 53. because it consists of things of several natures; and as a patent may be good in part, and naught in part, so it may be repealed for part, and stand for another part. Moor 327. pl.
455. The case
of the city of
Wells. 1 And.
230. pl. 246.
Signor Crom-
well, &c.

As to the third. Here are apt persons, because the heirs are concerned, because the question is, Who is the donor? not the executors, but earl *Robert* and his heirs, and the executors are only instruments; and the conclusion *ad damnum*

* P. 178. * *damnum* of the heirs doth not vitiate, because the court knows to whose damage the patent is.

Object. If this grant shall be repealed, the indowments of the hospital fail.

Resp. It was subject to repeal originally in the creation.

Hale chief baron *contra*. I premise three things, 1. Why I cannot give an opinion to repeal these letters patent without grand cause. 2. How the case stands here upon the patent and the will. 3. The reasons why this writ of *Scire facias* will not lie in this case.

As to the first. This is the first case in which clauses which have a general influence through the whole patent may be repealed. 2. It is a case of great moment in particular, because by this repeal the indowment is void; as the case of the abby of *Fountain* is; and here no master nor other officers may subsist. 3. Because there is no necessity to repeal them, because there are void clauses, and they may be tried at law; and that is the reason that judgment upon an issue tried in a *Scire fac.* to repeal a patent in *B. R.* is not there given, but the record is to be returned into this court, which is not in another case; and those things are of long continuance, (*viz.*) from 6 *Jac.* for then was the will, and the letters patent were 7 *Car.* 1. and it cannot be known what transactions have been passed betwixt the king and the heirs of *Richard* earl of *Dorset* during the time.

As to the second observation, upon the patent and the will.

1. No will of *Robert* appears by other record than by recital in these letters patent. 2. Although *Richard* son and heir of *Robert* was dead at the time of the letters patent, it appears not. 3. Although *de facto* *Edward* was father of *Richard*, it appears not. 4. It doth not appear that the land, upon which the hospital was built, was the indowment of the hospital; and if no indowment, no hospital. 1. It cannot be understood that *Edward* was heir to *Robert*, because here is an averment contrary; and he might be heir male in vulgar appellation. 2. The clauses are not substantive and independent clauses, but have an influence through the whole letters patent; and so by the repeal of them the patent shall be vitiated, *viz.* the naming and appointment of the several officers making of rules, constitutions and by-laws; and in this particular, this patent is not like to the patent in the Prince's case. 3. If here were not derogatory clauses, *viz.* to create a corporation according to the intention of the will, this will create a right to the heir
* P. 179. * to nominate; but here are derogatory clauses in it *secundum voluntatem*, which shall be according to the king's pleasure,

Term. Pasch. 21 Car. 2. B. R.

pleasure, otherwise the name shall be altered. 4. The licence to amortize. 5. Those clauses are not simply void, but only voidable, because the king takes notice of the will of earl Robert. 6. The grant made to Edward to make by-laws, is to him, and the heirs male of his body; but concerning election of members, this is to Edward, and the heirs male of the body of Robert.

As to the third. Such *Scire facias* lies not in point of form. 1. A patent may be repealed in part, but this shall be only in clauses independent. *Fitzh Petition* 19. 2. There will be an infinite inconvenience, if by this way part of this patent may be repealed; for by this way a good patent may be made naught, and *e contra*. 3. The king hath said how he will have this corporation qualified, and he is dead, and now we will make other patrons after his death. 4. The king hath said how it shall be governed, and not otherwise. And here is no necessity to repeal this, because if there be void clauses they may be tried in assize, and therefore the writ is ill. 2. It doth not lie for the matter. 1. Because the king takes notice of the clauses in the will which are desired to be repealed, and therefore he is not deceived in this grant. In the creation of the hospital *sunt tres Astores fabule*. 1. Earl Robert. 2. The king, whose right is to grant the incorporation. 3. The executors, which ought to indow this hospital. 2. The executors are not at any prejudice, because they are not compellable to indow this corporation, if it be not according to the will of earl Robert. 3. If the executors have indowed the hospital, being so created, it is a breach of trust.

Object. The king cannot dispose of the right of another, and here the founder was earl Robert.

Resp. There is no patronage till the foundation of the hospital, and the heir of Robert hath not to do with it till the foundation; and the executors do not break the trust. The lord keeper would advise, and so it was adjourned.

8 Maii 1669. William Lenthal was sworn in the office of marshal of the King's bench, in the place of sir John Lenthal, his grandfather, who died the last vacation.

Stone an attorney of B. R. having land within the manor of Harrow in the county of Middlesex, *ratione tenuræ*, ought

Privilege.
2 Keb. 477,
486, 491, 508.

Term. Pasch. 21 Car. 2. B. R.

* P. 180. ought * to serve as *Reeve* there, when elected; and he being now elected, prayed a writ of privilege, that he should not be compelled to gather the rents of the lord, and to serve in that office.

This privilege
denied Sir
Walter Vane
captain of the
guards, which
see before.
2 Keb. 309,
321.
1 Sid. 355.

Kelyng chief justice. This writ lies here, and is a stronger case than *Prouse's* case. *Cro. Car.* 389.

Twisden justice. A tenure may be created to such intent to collect the rents of the lord; and *Coke's Entr.* 436. an attorney exempted to be a soldier; so of a clerk of the bank, *Cro. Car.* 8. *Venable's* case. 2 *Roll.* 271. *March* 30. pl. 65. *Et adjournatur.*

Sir Andrew Henley *versus* Dr. Burstal.

Case.
1 *Danv. Abr.*
211. p. 17.
1 *Vent.* 23, 25.
2 *Keb.* 486,
494.
Vide before
135. *Low*
versus Beard-
more, for in-
dicting the
plaintiff of a
rescue, an ac-
tion doth not
lie.

AN action upon the case for maliciously indicting the plaintiff, being a justice of the peace, for delivering a vagrant out of custody, without examination, contrary to law. Upon Not guilty pleaded, a verdict found for the plaintiff; And *Swain* moved for the defendant in arrest of judgment, that such action doth not lie, because it deters a man from prosecuting for the king.

Maynard serjeant for the plaintiff. Where the indictment is preferred maliciously, and such indictment contains matter of imputation and slander as well as crime; there the action lies; but otherwise where the indictment contains crime without slander, as forcible entry, &c. but here is slander as well as crime; and of that opinion was all the court; and judgment was given for the plaintiff.

Price *versus* Crofts and others. Mich. 1657. B. R.

Case.

AN action upon the case in nature of a conspiracy, for indicting the plaintiff of barretry; one of the defendants is only found guilty.

And *Baldwin* moved in arrest of judgment, that one cannot be guilty of a conspiracy alone. But *per Cur.* it being but an action on the case it is well enough, and the plaintiff had his judgment.

THE plaintiff declares, that the defendant in *London* spoke these words to the plaintiff, *Thou art a thievish fellow, and stolest the plate from Wadham-College in Oxford.* The defendant justifies, that the plaintiff stole the said plate in *Oxford*. The plaintiff replies, that the defendant spoke the words *de injuria sua propria*; and the issue tried in *London*, and found for the plaintiff.

Mistrial.
1 Danv. Abr.
456.
1 Vent. 22.
1 Sand. 246.
2 Keb. 496.

And *Sanders* moved for the defendant in arrest of judgment, because a mistrial, because the issue ought to be in the county of *Oxford* where the justification is laid, and not in *London*; but adjudged for the plaintiff, because it is aided by the new statute of 16 and 17 Car. 2. cap. 8. But the defendant might have demurred upon it.

Kelyng, Chief Justice.
Twisden,
Rainsford, and } Justices.
Morton,

Lady Broughton *versus* Vosey.

Pleading.

TRESPASS for taking two horses. The defendant pleads, That the dean and chapter of *Westminster* have a court-leet in a particular jurisdiction, called the sanctuary in *Westminster*, within which the plaintiff hath a house, and that she by reason of the tenure of that messuage, ought to have that part of the street before the door, and for not paving she was presented at the leet held such a day, and assessed to 5*l.* and estreated, and the defendant as bailiff justifies the taking for the said 5*l.* The plaintiff replies, and traverses the *ratione tenuræ*, that she ought to repair, and concludes, *Et hoc paratus est verificare, unde petit judicium*, if the plaintiff *ab actione sua prædicta præcludi debeat*; and upon this the defendant demurs specially, because she doth not conclude *unde petit judicium*, & *dammæ suæ occasione transgressionis prædictæ sibi adjudicari*, &c. and for this cause the court seemed for the defendant; but a rule made by consent to take traverse and trial upon the tenure, upon payment of costs to the defendant.

This term were made seventeen new setjeants, (*viz.*) of *Gray's Inn*, sir *William Scroggs*, *Timothy Turnor*, *William Ellis*, *Thomas Hardres*, *Nicholas Wilmote*, and *Thomas Flint*. Of the *Inner Temple*, sir *Richard Hopkins*, *Christopher Goodfellow* and *Samuel Baldwin*. Of the *Middle Temple*, *John Turnor*, *John Barton*, *Francis Brampton*, and sir *Henry Peckham*. Of *Lincoln's Inn*, *Guibon Goddard*, sir *John Howel*, *Thomas Powys*, and *Thomas Jones*; all which read, besides *Scroggs* and *Jones*. They gave rings with this inscription, *Rex Legis Tutamen*.

In the last vacation died sir *Edward Atkins* knight, one of the barons of the exchequer.

Term.

Pordage *versus* Cole.

DEBT upon a deed poll concerning the purchase of land made by the defendant, of the plaintiff, dated the 1st of May 1668. where the plaintiff declares, that by the said deed it was agreed betwixt the plaintiff and defendant, that the defendant should pay to the plaintiff so much money, upon such a day, for the said land, the which he hath not done, *unde actio accrevit*; and upon this count the defendant demurs. And *Within* for the defendant alledged the cause to be, because the plaintiff doth not aver that the defendant enjoyed the land; and where there is not a mutual remedy (the deed being only poll, and not being by indenture) there ought to be such averment. 1 Roll. 518. pl. 3. *Holder versus Taylor*. In covenant to repair, where the lessee for years covenants to repair, *Proviso*, that the lessor find grand timber, there in an action of covenant the plaintiff ought to aver that he offered grand timber. So 5 Co. Gray's case, 78. b.

Covenant.
2 Danv. Ab.
229. C. p. 1.
1 Lev. 274.
1 Sid. 423.
1 Sand. 319.
2 Keb. 533,
542.

Jones for the plaintiff. Here the defendant covenants to pay at a certain day, and perhaps the conveyance cannot be made by that day; and it doth not appear that the land was not conveyed before.

Kelyng chief justice. It seems no agreement of the other part, for it is not by indenture.

Twisden justice. In covenant the words were, The plaintiff putting the house in repair, the defendant covenanted to keep it so repaired. Resolved they were mutual covenants. Cro. Jac. 645. *Salter versus Stone*, *Styles* 140. *Brag versus Nightingale*.

Rainsford and *Moreton* justices. It seems a covenant by it self; and judgment was given for the plaintiff; but the defendant brought a writ of error in the exchequer chamber upon the matter in law.

* P. 184.

* Drake *versus* Hill.

Words.

1 Danv. Abr.

128. p. 38.

1 Lev. 276.

1 Sid. 424.

2 Keb 549.

THE defendant said of the plaintiff being a merchant and maintained himself and his family by buying and selling; *Austen Drake is broke, and gone for Virginia; I have ill fortune, for Austen Drake is failed, and I have lost my monies. Austen Drake is a beggarly fellow, and not worth a groat, and not able to pay his debts, and rides abroad with his man double armed for fear of bailiffs.* Upon Not guilty, verdict for the plaintiff.

And serjeant *Maynard* moved for the defendant in arrest.
1. That the last words are not actionable; for *beggarly fellow* are only words of reproach, and *not worth a groat*, the case of *Moon and Moxam*, 14 Car. 1. Judgment was there reversed in the exchequer chamber; and there is a difference when the words of themselves are not actionable, yet if they be accompanied with special damage, they are actionable, as *Low and Harwood's* case. Judgment in *Winfor* reversed where he said, that the defendant said, that the plaintiff had not title to land, by reason of which he could not sell, and *Nevil and Francis's* case. And bankrupt is a crime that implies deceit, but to be poor is no crime.

Kelyng chief justice. To say that *he is not worth a groat*, is not actionable, because he may be an honest man notwithstanding; but it seems that the other words seem actionable.

Twisden justice. *H.* may pay his debts, and yet not worth a groat after; but to say that *He is not able to pay his debts* is actionable; and judgment was given for the plaintiff.

* P. 185. * Term. Hill. 21 & 22 Car. 2. B. R.

Coin.

STINTON, keeper of the *Turnstile-tavern* in *Holbourn*, was informed against for uttering brads halfpence, and he came in and confessed the fact laid in the information, and his fine was pardoned, and he was bound by recognizance not to utter any more.

Trespass

Term. Pasch. 22 Car. 2. B. R.

Trespafs for taking forty ſheep, and chaſing of them, by reaſon of which chaſing one of them died; and the defendant pleads, that the place in which the chaſing is ſuppoſed was his freehold, and that he *leniter* chaſed them, *quæ eſt eadem tranſgreſſio*. The plaintiff replies, and juſtifies for common. The defendant rejoins by incloſure; and the plaintiff demurs. And *Lewinz* for the defendant urged that the bar is not good, becauſe he doth not answer to the chaſing of the ſheep, for he ought to have traversed it. *Cro. Eliz.* 384. *Hill verſus Prideaux*, and *Trin.* 19 Car. 2. *Copley verſus Perry*.

Jones for the plaintiff. It is frequent in treſpafs to answer to the beating & *male tractation*, and that he *molliter manus impoſuit*, *quæ eſt eadem tranſgreſſio*.

Twisden juſtice. The plaintiff relies by his replication upon the common, and waives the ſtaying of the ſheep, &c. and therefore it is good enough; and with this agreed the whole court; and judgment was given for the plaintiff.

This term *Timothy Littleton*, ſerjeant at law, was made one of the barons of the exchequer.

* Term. Paſch. 22 Car. 2. B. R. * P. 186.

SMITH, *Hains*, *Tunman*, and others, commissioners of Contempt. ſewers in *Middleſex*, made an order concerning the amendment of a breach at *Blackwall*, and aſſeſſed the inhabitants of *White-Chappel* to contribute, and the inhabitants procured a *Certiorari*, and notwithstanding that the commissioners proceeded; and upon this an attachment was granted, and they were committed to the *Marſhalſea* for the ſaid contempt. ^{1 Mod. 44.} ^{1 Lev. 288.} ^{1 Vent. 66.} ^{2 Keb. 635.}

Frere of *Rayneham* in the county of *Kent* was indicted at the ſeſſions at *Maidſtone*, for not contributing to the repair of highways, contrary to the form of the ſtatute of 2 & 3 ^{Ways.} ^{1 Vent. 69.} ^{2 Keb. 617.} *Phil.*

Term. Pasch. 22 Car. 2. B. R.

Phil. & Mar. cap. 8. and removed this by *Certiorari*; and when the record of the indictment was removed into this court, he came before justice *Morton*, and submitted himself to a fine, who fined him upon two indictments to 20*s.* last *Michaelmas* term; and now the inhabitants suggest by motion and affidavit, that *Frere* hath eight plow-lands, and consequently that he ought to have found eight carts for six days, and that the judge was surprised; and although that his land was pasture, yet the court set aside the fine, and ordered, that he proceed to trial upon these indictments, if he do not agree with the parish before next assizes, for by his own confession he hath 1700 acres of arable and pasture.

This term died sir *Jeoffry Palmer*, knight and baronet, attorney general, and sir *Heneage Finch* solicitor general succeeded in his place, and sir *Edward Turnor* was made solicitor general.

• P. 187.

* *Copping versus Hurrier.*

Intr. Hill. 20 & 21 Car. 2. Rot. 1261.

Award.
2 Danv. Ab.
540. p. 2.
1 Lev. 285.
1 Sid. 428.
2 Saund. 129.
1 Mod. 15.
2 Keb. 562.
619.
Postea *Dennis*
versus
Mascul.

DEBT upon an arbitrement, the submission was to two, *Ita quod* they make their award before the last day of *Michaelmas* term, and if they cannot agree, then to *A.* who then shall be umpire to make the award within the said time; and the plaintiff declares, that the arbitrators did not make any award, but the umpire made his umpirage, and shews it; and the defendant demurs upon this count, because the umpirage was void, because the arbitrators had all *Michaelmas* term, and the umpire cannot intermeddle during that time, and for that it was adjudged for the defendant; and in this case was cited *Roll* 261. 1 *Part*, *Lumley* and *Hatton's* case and *Barber* and *Giles's* case, and *Dyer* 347. and *Barnard* and *King's* case. *Vide Godbolt* 241. pl. 334. *Fial versus Varier, contra.*

Horfeley versus Potton.

Case.
1 Lev. 286.
1 Sid. 457.
2 Keb. 610,
647.

IN an action upon the case; the plaintiff declares, that he did lend his gelding to the defendant to ride from *Swaffham* in *Norfolk* to *Peterborough* in the county of *Northampton*, and the defendant abused the said horse *in itinere*. Upon Not guilty pleaded, verdict was for the plaintiff. And *Holt Junior* moved in arrest of judgment, because there is not any visne where the abuse of the gelding was, but

Term. Trin. 22 Car. 2. B. R.

but only *in itinere*, *Cro. Jac.* 266. and *Cro. Car.* 20. *White*
versus Ridsen; and judgment stayed till the other party moved.

Chester and Willan. *Ejectionment.*

A DEVISE to eleven and their heirs; the defendant being one of the eleven, by indenture for 100*l.* granted, bargained, sold and confirmed to another of the eleven; and if any estate passed was the question, (*viz.*) where one joint-tenant grants to another, if this amounts to a release; and adjudged that it doth. *Roll* 810. 1 *Part. Cro. Jac.* 314.

Release.
1 Vent. 78.
2 Sand. 96.
1 Sid. 452.
2 Keb. 641.

* Term. Trin. 22 Car. 2. B. R. * P. 188.

DIGHTON, town-clerk of *Stratford upon Avon*, was turned out of his place by the corporation, and he prayed a writ of *Mandamus* to restore him; and it was granted; and upon this the corporation returns, That the king by his letters patent grants, that they shall have a town-clerk which shall continue *durante bene placito* of the mayor and aldermen, and that the said *Dighton* was made town-clerk, and they turned him out; and upon this return the question was, If the corporation hath an arbitrary power to turn out the said town-clerk, or ought to shew reasonable cause.

Mandamus.
1 Lev. 291.
1 Vent. 77.
82.
1 Sid. 461.
2 Keb. 641.
656.

Jones for *Dighton*. Many corporations have such officers, and it is of consequence. *Cro. Jac.* 540. *Warren's* case. An alderman cannot be so turned out; and as to *Blackgrave's* case this was not argued; and here they did not give notice: but by all the court, the continuation of him in his office is in the will and pleasure of the corporation; and upon this restitution was denied; but the court advised to repeal the patent because inconvenient.

This term *Hugh Wyndham* serjeant at law was made baron of the exchequer.

Term.

The Justices being

Kelyng, Chief Justice.

Twisden,
Rainsford, and } Justices.
Morton,

But *Kelyng* was sick the whole term.

Michel versus Bilby.

Prohibition.

THE defendant sued the plaintiff in the court of *Faversham* upon an *Assumpsit* for wares; the defendant there, and the plaintiff here, tenders a plea, that the contract upon which the action is brought, was made out of the jurisdiction, and demands judgment if the court will take consance, &c. the court there refused to allow this. And *Jones* moved for a prohibition, producing an affidavit of the said tender of the plea and refusal; and the court granted the said prohibition.

Rinch versus —

Error.

THE case was such. *Rinch* brought two actions on the case against a widow in the *Pipowder-Court* in *Gloucester* about two years ago; and about *January* last brought two other actions of the same nature against the same party. Upon the two first, judgments were given long since, and upon the two last the defendant had demurred, and judgment given against her, and writs of inquiry were executed, but no final judgment given. The defendant brings two writs of error, which were allowed by the mayor and town-clerk, and the two first judgments removed; whereas in truth * the defendant intended to have the two other causes removed, and not the two first, for that they were long before

Term, Mich. 22 Car. 2. B. R.

before satisfied; but notwithstanding the said writs of error, after the return thereof was out, the plaintiff entered judgment upon the two last actions, and took out execution upon the same; and the defendant moved by *Saunders* for the attachment. But resolved *per Cur.* there is no contempt, because when there were two judgments formerly entered, the town-clerk might certify them to satisfy the writs of error; and he could not certify the other two, because no judgment was given upon them, and the writ of error commands to certify *si judicium redditum sit*, and the defendant might have helped this by moving the court below after costs taxed to have judgment entered in the two last actions as well as the plaintiff, for judgment ought to have been given at the request of either party; and so the contempt was discharged.

Laffels versus Chatterton.

DEBT for 1000*l.* upon an indenture. The plaintiff declares, That by indenture the defendant did covenant with the plaintiff to convey certain lands in *Bowmer*, demised to *Bointon*, to the plaintiff, by such conveyance as the plaintiff's counsel should advise; and that the plaintiff, by the advice of his counsel, did tender to the defendant a conveyance by lease and release, and sets forth both in *hæc verba*, which release contained several covenants, amongst which one was against a stranger; and also here was comprehended a warranty against the defendant and his heirs, and that the plaintiff tendered the said conveyance, and the defendant refused to seal the same. The defendant pleads, that he did not tender the said conveyance; and issue was taken thereupon; and verdict *pro quer.*

Condition.
2 Danv. Ab.
38. p. 24.
1 Sid. 467.
1 Mod. 67.
2 Keb. 685.
Vide Syd. 467.
Mod. Rep. 67.

And *Levinz* for the defendant moved in arrest of judgment, because the conveyance tendered is not such as is warranted by the said articles, because it comprehends covenants, which it ought not to have done, and that the articles had been to make such reasonable assurance as counsel should advise, and perhaps reasonable covenants might have been inserted, but not any covenant against a stranger, nor warranty. 2 Cro. 571. *Coles versus Kinder.* 1 Roll 424. pl. 13. per Coke 2. The agreement is to convey all the lands in *Bowmer* demised to *Bointon*; and the conveyance is not only of them, * but of all other his lands whatsoever; and for his last exception, *Weston* for the plaintiff acknowledged that it cannot be good, and thereupon judgment was stayed. But by *Twisden*

Term. Mich. 22 Car. 2. B. R.

Twisden justice, The law is altered since *Cole* and *Kinder's* case, as to covenants in a conveyance, if they be reasonable, but not that he is seised of an absolute estate in fee-simple, or the like.

Nota. By *Twisden* justice. It was resolved in one *Long's* case, that upon an information upon the statute of usury, he who borrows the money may be a witness after he hath paid the money, but not before.

Ellis versus Winne.

Prohibition.

THE defendant sued the plaintiff in the court of the *Marches of Wales* at *Ludlow*, for a legacy of 50*l.* and a brass pot; and the plaintiff prayed a prohibition, by *Williams, & habuit*, because this court by their instructions have not power to hold plea of a legacy.

Dominus Rex versus Wild.

Apprentice.
1 Lev. 296.
2 Keb. 686.

AN information upon the statute of 14 Car. 2. cap. 5. against the defendant, being a worsted weaver in *Norfolk*, for retaining above two apprentices, contrary to the form of that statute. Upon *Non culp.* pleaded, Verdict was found against the defendant.

And *Jones* moved in arrest of judgment, because the statute is misrecited, because it is said, at a session of parliament holden at *Westminster* by prorogation, 18 Febr. 14 Car. 2. following the printed book of Mr. *Manby*. Whereas the parliament roll is, and so is the print set out by the company of stationers, at the parliament begun at *Westminster* the 8th of May 13 Car. 2. and there continued till 19th of May 14 Car. 2. and thence prorogued to the 18th of February then next following; and this misrecital vitiates the count, for there was no such session of parliament as is alledged; and so was *Partridge's* case, *Plowd.* 84. a. Although it be a private act, for the judges are to take notice judicially of all parliaments and their sessions.

• P. 192.

• *Twisden* justice. There is a difference when the information or action is grounded upon an act of parliament, and the conclusion is, *contra formam Statuti prædicti*, there the information is not good, if the statute be misrecited; but if the conclusion be *contra formam Statuti in hujusmodi casu editi & provisi*, there it may be good, notwithstanding the misrecital, because the court can take notice of a good act

Term: Mich. 22 Car. 2. B. R.

act of parliament to punish the offence mentioned. But judgment stayed until, &c.

Bolus versus Hinstorke.

TRESPASS for breaking his close, and taking and impounding the plaintiff's oxen. The defendant pleads, That sir *Henry Vernon* was seised in fee of the close called the *Low Leasow* in *Peplow*, being the place where the taking is supposed, and he being so seised demised the same such a day to the defendant for ninety-nine years, determinable upon three lives, by virtue whereof he entered, and was thereof possessed, and justifies taking the beasts damage-feasant and impounding them. The plaintiff replies, and confesses the seisin of sir *Henry Vernon*, and the lease to the defendant; but he farther says, That sir *Henry Vernon* was also seised of another close called *Bowns*, adjoining to *Low-leasow* close, and that there is and hath been time out of mind a custom in *Peplow*, that the occupiers of *Low-leasow* close ought to repair the fences between the said closes; and that the said fences were out of repair, and that the cattle went into the defendant's close *pro defectu sepium*. The defendant takes issue upon the custom, and a verdict for the plaintiff. And serjeant *Baldwin* moved for the defendant in arrest of judgment. 1. That the replication was not good, because the custom, if good, is extinguished by the unity of possession in *Vernon*. 2. Admitting it not extinguished, yet that custom laid in occupiers is not good; but it ought to be laid in them who have the inheritance. 1 Cro. 302, 418. *Baker versus Brereman*.

Twisden justice interrupted, and said, that point had been adjudged both ways. As to the unity of possession, it doth extinguish the prescription. *Dyer* 295. b. pl. 19.

And by *Twisden* and *Morton* justices, The prescription is gone by the unity. But it was adjourned, and stayed, &c.

* *Bland versus Levit.*

* P. 193.

THE plaintiff takes out a *Latitat* against the defendant Officer, with an *ac etiam billæ* for 60*l.* directed to the sheriff of *Cambridgeshire*, who sends it to the bailiff of the franchise of *Ely*, who arrests the defendant, and takes sureties upon a bond of 40*l.* and then returns *Cepi Corpus*, but never brings in the body, but combining with the defendant lets him go at liberty, and the bailiff himself lives out of the franchise.

N

Term. Mich. 22 Car. 2. B. R.

franchise and employs a deputy. Several *Distingas*'s issued, but the bailiff is worth nothing, and so the plaintiff is like to lose his writ; especially the sheriff having already returned issues upon the bailiff, he cannot return *Nichil*; and thereupon *Levinz* moved for an attachment against the bailiff; and it was granted, *nisi*.

Dominus Rex *versus* Ladſingham.

Verdict.
2 Danv. Abr.
651. R. p. 1.
1 Lev. 299.
1 Vent. 97,
104.
1 Mod. 71,
288.
2 Keb. 687,
697.
Pollex 205.

AN information was exhibited against Mr. *Ladſingham* of *Devonſhire*, lord of a manor there, for oppreſſing his tenants, and for ſeveral miſdemeanors; and upon Not guilty pleaded, he was found guilty; and *Stroud* moved to ſet aſide the verdict, becauſe unduly given. The information being laid in *Devonſhire*, and the trial there, and yet the jury gave a privy verdict in the county of the city of *Exceſter*, which was illegal. 1. To give a privy verdict in a criminal cauſe, contrary to *Coke* upon *Litt.* 227. b. 2. To give the verdict out of the county. But to both theſe the court answered thus. *To the firſt.* 'Tis intended that no privy verdict can be given in criminal caſes which concern life, as felony, becauſe the jury are commanded to look upon the priſoner when they give their verdict, and ſo the priſoner is to be there preſent at the ſame time; but in criminal caſes, where the defendant is not to be perſonally preſent at the time of the verdict, a privy verdict may be given. *And as to the ſecond.* Cuſtom hath always been to give the verdict in that place; and the court did not think the firſt point fit to be moved, becauſe contrary to the record, but however they reſolved as before. *Vide poſt.*

* P. 194.

Caſe.
1 Danv. Ab.
190. p. 3.
2 Keb. 688,
716.

ASPECIAL action upon the caſe, wherein the plaintiff declares, That one *Proſtor* brought an action againſt the plaintiff, in which the defendant was attorney for the ſaid *Proſtor*, and that there was a trial in the ſame againſt the now plaintiff; and that after the trial, and before the rules were out according to the cuſtom of the court, the defendant did enter judgment againſt the now plaintiff, by reaſon whereof he was prevented from moving in arreſt of judgment. Upon this declaration the defendant demurred, but did not appear to maintain his demurrer. But juſtice *Twifden* thinking it hard that an attorney ſhould be ſued after the ſaid judgment was ſet aſide, and conſequently the plaintiff

* Goodyeat *verſus* Banks.

pl
a

I
tw
-be
ſign
wh
him
mur
J
Dea
ther
Adm
poli
of a
not
liable
Tha
ſhall
that
ſhall
but b
canno
* S
grofs,
days
Dento
be mi
only a
of the
would
rent p
tiſhes.
plainti
Tw
Magda
is void

Term. Mich. 22 Car. 2. B. R.

plaintiff not damnified, respited the giving judgment for a while.

The Dean and Chapter of Windfor *versus* Gover.

DEBT for rent due for six years, upon a lease for years to the defendant, of tithes; the defendant as to the two years pleads *Nil debet*, and as to the other four years he pleads, that before any of the said rent incurred, he assigned over the said lease and tithes to one *Vaughan*, of which the plaintiff had notice, and did receive rent from him; judgment *si actio*: And upon this the plaintiff demurred generally.

Jones for the plaintiff. The points are, 1. When the Dean and Chapter make a lease of tithes rendering rent, whether the money reserved be a sum in gross, or a rent. 2. Admitting it to be a rent, yet the case being concerning a politick body, whether the acceptance shall bind, as in case of a private person. 1. This is a sum in gross, and doth not pass by the grant of the rent, neither is the assignee liable thereto. 5 Co. 3. a. *Fuel's* case, 2 Roll. 446 and 451. That rent issues not out of tithes. Co. Lit. 47. a. The rent shall not pass with the grant of the reversion. 2. Admitting that it be a rent, yet this acceptance alledged in the plea shall not bind the corporation, because they can do nothing but by attorney or bailiff made by their common seal, and cannot by themselves take notice of this assignment.

* *Saunders* for the defendant. If it should be a sum in gross, then the plaintiff had no cause of action, for all the days are not yet incurred; and 2 Cr. 111. *Talentine versus Denton*, It is a good lease, being for years: And it would be mischievous if it were not a good lease, for if it were only a personal contract it would only go to the executors of the dean or bishop, and not to the successor, which would be contrary to the intent of the parties; and it is a rent payable for the tithes, though not issuing out of the tithes. As to the second point, It shall be presumed that the plaintiff accepted the rent from *Vaughan* legally.

Twisden justice. As to the second point 'tis resolved in *Magdalen College's* case, 11 Co. 79. a. that such acceptance is void. *Adjournatur*.

Rent.
1 Lev. 308.
1 Vent. 98.
2 Saund. 296,
302.
2 Keb. 688,
722, 737, 775.

Throckmorton
versus Tracy
in *Plow. Com.*
A lease for life
by abby and
convent with-
out deed, shall
be intended
by deed, 1 Cr.
169. Edgar
and Web *versus*
Sorrel, Entry
without war-
rant of Attor-
ney, 2 Cr. 411.

* P. 195.

Mortlock *versus* Charleton. Error in Nottingham.

Amerciamt.
1 Darv. Abr.
479. H. p. 1.
2 Saund. 191.
1 Mod. 73.
2 Keb. 688,
704.
2 Rol. Rep.
45. Gerard
vers. Warren.
Vide post. Pow-
el *vers.* Row.

DEBT upon a bond; the defendant pleads *Non est factum*, and afterwards *relicta verificatione cognoscit actionem*, and judgment for the plaintiff, and the defendant in *miser cordia*; and this assigned for error, because the judgment ought to have been, that the defendant *capiatur*, 8 Co. 60. a. Breecher's case; but because 2 Cro. 64. *Devis versus Clerk*, is, that it shall be in *miser cordia*, and so the books vary, *Adjournatur*.

Yard *versus* Ford.

Nufance.
1 Lev. 296.
2 Saund. 172.
1 Vent. 98.
1 Mod. 69.
2 Keb. 689,
706.

IN an action upon the case. The plaintiff counts that he is possessed of the manor and borough of *Newton Abbots* in the county of *Devon*, and hath and ought to have a market every *Tuesday* in the said town; and that the defendant at *Aspburton* in the same county, within seven miles of the said *Newton Abbots* erected a new market, and keeps the same every *Wednesday*, to the plaintiff's prejudice. Upon *Non culp.* pleaded, verdict was found for the plaintiff. And *Jones* for the defendant moved in arrest of judgment, that this action will not lie, because it appears that the erecting of this new market cannot be to the plaintiff's damage, it not being kept on the same day that the plaintiff's market is kept. 2 Rol. 140. pl. 2.

* P. 196. * *Twisden* justice. There seems no difference when the new market is kept, whether on the same or any other day, so as it be to the plaintiff's prejudice, which is here found: But let it stay for a while to consider; *Et adjournatur*. But afterwards it was adjudged for the plaintiff.

Dominus Rex *versus* More.

Peace.
2 Keb. 689.

MORE together with *Turner* and *Smith* enter into a recognizance to the king, upon condition for the good behaviour of *More*; then *More* is indicted, for that he being so bound, did assault *J. S.* and so he hath forfeited his recognizance; and *Williams* moved to quash this indictment, because *More* ought to have been prosecuted by *Scire facias* and not by indictment; and for this reason the indictment was quashed.

Jones

Term. Mich. 22 Car. 2. B. R.

Jones *versus* Powel. Error in C. B. for Words.

THE plaintiff declares, that he is an attorney of C. B. and that the defendant and he had discourse of the plaintiff, and of his profession; and that the defendant said to the plaintiff *in auditu quamplurimorum*, *Thou canst not read a declaration*, by reason of the speaking of which words, A. B. and C. the plaintiff's former clients deserted him, *ad damnum*. Upon Not guilty, a verdict for the plaintiff, and a judgment; and the said judgment was affirmed.

Words.
1 Danv. Ab.
118. p. 1.
1 Lev. 297.
1 Vent. 98.
1 Mod. 272.
2 Keb. 710.

Dominus Rex *versus* Allen.

AN information upon 12 Car. 2. cap. 13. for taking excessive usury. The information is, That the defendant 16 November 20 Car. 2. did lend to J. S. 20l. till June then next following, and that afterwards, *viz. ad finem termini predicti*, he took of the said J. S. *corrupte & extorsive*, for the loan aforesaid, 30s. which was above the rate by the said statute allowed. Upon Not guilty pleaded, a verdict was found against the defendant; And Kelyng moved for him in arrest of judgment, because the corrupt agreement ought to be within the statute at the making of the contract, and not at the end of the term, as it is laid in the information.

Usury.
2 Keb. 690.
1 Mod. 69.

* *Twisden* justice. There is this difference, if the party who lends the money contracts for more than 6l. *per cent.* all the assurance is void: but if he doth not contract for more than the statute allows, and afterwards he will take more, the assurance shall not be avoided, but the party shall forfeit the treble value; as if a man when money was at 8l. *per cent.* lends money, and takes bond for the same, and then the statute of 12 Car. 2. is made, and he will continue the old interest upon that bond, the bond shall not be avoided by such acceptance of interest, but the party shall forfeit the treble value by the statute; but judgment was staid till the other side moved, because the court would advise.

* P. 197.

Twyford *versus* Bernard. Trin. 22 Car. Rot. 586.

DEBT upon a bond of 300l. The defendant pleads that the said writing was delivered as an escrow to one Godfrey Woodward a stranger, upon condition, That if the

Obligation.
2 Keb. 690.
733.

the

Term. Mich. 22 Car. 2. B. R.

the plaintiff shall procure a demise of certain tenements to the defendant from a certain company in *London*, or should give good security that he would procure the said demise before such a day, that then the said *Woodward* should deliver the same, *ut scriptum suum* to the plaintiff, otherwise that he should keep the same in his hands; and the defendant pleads, that the said *Woodward* did not procure the said demise, nor give security as aforesaid; *Et sic non est factum suum*. The plaintiff demurs, because he answers not the deed, for *Woodward* never had authority to deliver his writing *ut factum*, but *scriptum suum*, which is not good; and such was the opinion of *Twisden* and *Rainsford* justices; but *Morton contra*. But *Simpson* being of counsel for the defendant, moved that the plaintiff might take issue upon the special plea, *scriptum* being made *factum*; and judgment thereupon was staid entering for a time.

* P. 198. * Foxwift and four others executors of Mr. Pinfent, late one of the Prothonotaries of the Common Pleas, against Tremain. Trin. 21 Car. 2. Rot. 1512.

Executor.
1 Danv. Abr.
604. p. 3.
3 Danv. Abr.
412. p. 3.
1 Vent. 102.
1 Lev. 299.
1 Mod. 47; 72,
296.
2 Keb. 625,
633, 691,
698, 537.
1 Sid. 449.
2 Saund. 212.
Vide post 243.
S. Barbe versus
Burton.

INDEBITATUS ASSUMPSIT for monies received to the testator's use for damage clere. The defendant pleads in abatement, that two of the plaintiffs (and names them) are under the age of seventeen years. The plaintiff demurs, and whether the three that were of full age, and the infants ought to join in this action was the question. *Coleman* for the defendant, That they cannot join, because the infants under seventeen years are not capable of administering, but there ought to be an administrator *durante minori etate*, as sir *Moil Finch*'s case is, and therefore they cannot be more able by being joined with others.

Hatton versus Maskew and another.

Trin. 15 Car. 2. B. R. Rot. 1117.

Executor.
3 Danv. Abr.
412. p. 3.
1 Lev. 181.
1 Lev. 750.

IN a writ of error in the exchequer-chamber, upon a *Scire facias* brought by *Maskew* and one other to have execution of a judgment in debt; the plaintiff sets forth in the writ of *Scire facias*, that the testator made the plaintiff and another his executors, and that the other is under the age of seventeen years; and the defendant demurred upon the writ, for this very cause, that the other upon the plaintiff's own shewing was a joint executor, and not joined in

the

Term. Mich. 22 Car. 2. B. R.

the action. But resolved the writ was good, because the infant ought not to join, and so judgment was here given, and also affirmed in the exchequer-chamber.

Offley for the plaintiff. There is a difference where there is but one executor, and he an infant under the age of 17, and where there are other executors joined with such infant; for in the first case the infant cannot sue, but in the other case an infant may be joined with the others. True it is, the executors of full age may sue without the infant, and set it forth in their declaration, as in *Hatton* and *Maskew's* case cited by *Coleman*; but 'tis as well where they all join. * 1 Roll. 288. pl. 2. and the very case ruled in *Yelverton* 130. * P. 199. *Smith* versus *Smith*, and 3 Cro. 378. If three executors, and one be an infant, yet they shall all join in the action by an attorney, and the infant shall not sue by guardian, because they all make but as it were one person, and represent their testator jointly.

Twisden justice. The action is well brought by all the executors jointly, and no administration can be granted during the minority of the infants, and all make but one person; and it may be brought either as *Hatton* and *Maskew's* case is, or this way, and both good. *Sed adjournat.* But afterwards adjudged *Quod Def. respondeat ouster*, by *Rainford* and *Moreton* against *Twisden*, who held the plea good, because an infant is an executor, *quoad esse, non quoad exercitium*.

Hayman versus *Truant*.

IN *Assumpsit*. The plaintiff declares that the defendant Pleading.
such a day and year bargained and sold to the plaintiff 1 Vent. 101.
certain corn, affirming the same to be his own, and war- 1 Mod. 72.
ranting it to the plaintiff, whereas it was the corn of one 2 Keb. 692.
Stokes, who since recovered damages against the plaintiff for the same. The defendant pleads a prior action for the same matter still depending in abatement of the bill. The plaintiff replies, that the contracts are several, and the cause in the former action and this are several and for several matters, *Absque hoc*, that they are for the same matter. And the defendant demurs specially, viz. because the plaintiff ought to have concluded to the country, and not taken a traverse; for by that means the defendant might have rejoined, and so an infinity might be in the pleading; and so seems 3 Cro. 755. *Huish* versus *Philips*.

Twisden justice. The pleading is well, and so is the constant practice. And the case of *Huish* and *Philips* was adjudged

Term. Mich. 22 Car. 2. B. R.

judged upon another point, viz. for defect in the plea, because it is, *Et prædictus Busb (un stranger) dicit, pro le Defendent.* As appears in *Telverton* 38. & 3 Cro. 13. where the same case is also reported. *Et Judgment fuit done per le Plaintiff quod Def. respond' oust'.*

• P. 200.

• *Hambleton versus Bere.*

Damages.
2 Danv. Abr.
460. p. 12.
1 Lev. 299.
2 Saund 169.
2 Kcb. 623,
627.

IN a special action upon the case for enticing his apprentice out of his service. The plaintiff declares, that 16 Car. 2. he entertained *A.* his apprentice to serve him for nine years, and that the defendant inticed the said *A.* from his said service, *per quod* he hath lost his service for the whole term of nine years: Upon *Non Culp.* pleaded, a verdict was given for the plaintiff.

And *Saunders* for the defendant moved in arrest of judgment, because the plaintiff hath brought his action too soon, or at least hath laid his damnification too large, because he hath alledged his damage to be by the loss of the apprentice's service for the whole term, whereas it appears that some years of the nine are yet to come; and so the jury have given damage for what the plaintiff hath not sustained loss, and the apprentice may return, and yet the plaintiff recover for his absence; and of this opinion was justice *Tawfelen*, and therefore the judgment was staid till farther motion to be made by the plaintiff; and afterwards judgment was arrested, because the jury was guided by the *per quod*,

Guilliams versus Munnington. Hereford.

Replevin.
1 Lev. 308.
1 Vent. 180.

ON replevin for taking his cattle; The defendant avows for that *A.* was seised in fee in the place where, &c. and being seised, by his deed *hic in Curia prolat'*, granted to *Anne Munnington* a rent-charge out of the said lands with a clause of distress to *Anne Munnington*, who by indenture of bargain and sale duly inrolled in the sessions at *Hereford*, granted the said rent and arrears thereof to the defendant; and because so much was in arrear, the defendant avows the taking. The plaintiff pleads in bar to this avowry, that the defendant took the said cattle *de injuria sua propria, absque hoc*, that the said *Anne Munnington* did grant the said rent and arrears to the defendant; and issue is taken thereupon, whether *Anne Munnington* did grant the rent and arrears to the defendant; and verdict for the defendant.

And

Term. Mich. 22 Car. 2. B. R.

And *Jones* moved for the plaintiff in arrest of judgment.
1. Because the grant is alledged to be of a rent and of the
arrearages thereof, and issue is taken thereupon, and the
* jury find the grant of the rent and arrearages; whereas it
is impossible that any such grant can be, because the arrears
are not grantable over, because things in action, and there-
fore there ought to be a repleader in this case. *Hob.* 112.
Tasfer versus Salter, *Moor* 867. *pl.* 1198. 2 *Cr.* 131. *Mar-*
ham versus Pescod. And though issue be found for the avow-
ant, yet it being impossible, 1. It will not be helped. 2
Cro. 682. *Buckland versus Otely*. 2. The avowant hath not
made a good title to the rent, because he pleads it by way
of bargain and sale, and that by virtue thereof, and of the
statute for transferring uses into possession he was seised, and
yet alledges no consideration, not so much as *pro quadam pe-*
cunia summa, which is not good.

Twisden justice. The first exception seems of little
validity after verdict, but the second is material, and judg-
ment staid until, &c.

* P. 201.

Dominus Rex *versus* Saunders.

INFORMATION for writing a scandalous letter to *Scandal*.
Hatton Rich, brother to the earl of *Warwick*, who was
indebted to him 300*l.* and this *Saunders* having been delayed
for three years by the said Mr. *Rich*'s obtaining a protec-
tion, and at length taking the prison of the *King's Bench*,
he wrote a letter to him, wherein he tells him, *That if he*
had any honesty, civility, sobriety or humanity, he would not
deal so by him; and that he would one day be damned and be in
hell for his cheating, or words to the like effect, and cited
several places of scripture to make good his allegations.
And in the information was laid, that he published this let-
ter in the presence *Quamplurimorum*; and upon *Non Culp.*
the defendant was found guilty of all; whereas (in truth) if
the matter had been taken care of at the trial, the publica-
tion was not proved.

And now *Saunders* moved in arrest of judgment, for that
the substance of the letter is not scandalous, but impertinent
and insignificant, and shews a zeal in the defendant to ma-
nifest his sense of the injury he hath sustained by the non-
payment of the money.

Twisden justice. The letter is provocative, and tends to the
incensing Mr. *Rich* to break the peace, and therefore an infor-
mation lies: *Mes adjornat*. And afterwards the court adjudged
the letter scandalous; and *Saunders* was fined 40 marks.

Dominus

* P. 202.

* Dominus Rex *versus* Sykes.

Perjury.

INFORMATION for perjury; upon Not guilty pleaded, upon the trial the record of the trial wherein the defendant is alledged to be perjured, was produced, and it varied from what it was laid in the information, and at the assises it was allowed to be found specially: and upon opening the verdict by *Bigland* for the defendant, it was resolved by *Twisden* justice and the whole court (*absente Kelyng* chief justice) that the jury cannot have consuance of any variance between the record and the information; but the judge at the trial ought to have determined it; and so a *Venire facias de Novo* ought to issue.

Powel versus Row.

Mich. 21 Car. 2. Rot. 807.

Amerciament.

1 Danv. Ab.

479. H. p. 1.

2 Keb. 674.

694.

Vide ante

Northlock

versus Charlton.

ERROR to reverse a judgment given in *Bristol*. In an action of debt upon an obligation, the defendant pleads *Non est factum*, and afterwards *relicta verificatione* confesses the action, and the judgment thereupon is entered, *Quod defendens sit in misericordia*. And the error assigned was on that part of the judgment, whereas it ought to be *Capiatur*, according to *Dyer* 67. pl. 19.

Aires for the defendant. That it is well enough, for that no book warrants the case in *Dyer*, but 8 Co. 60. a. *Baker's* case; and if we look into the reason, it is plain, that it ought to be *misericordia*, because the judgment is upon the confession of the action, and not upon the defendant's former plea: and of this opinion is 2 Cr. 64. *Davidge versus Clark*. Mich. 33 H. 6. 54. b. pl. 44. Mich. 34 H. 6. 20. a. pl. 37. *Keitw.* 42. a. pl. 4. *Rast. Intr. tit. Debt*, in *Recovery* 4. and *judgment* 3. 1 Roll. 224. *Wright's* case, and so is the constant course, and so are all the precedents in B. R. and C. B. And the case of *Dyer* is but as he found it recorded, but *Trin.* 9 E. 4. 24. a. is *Misericordia*.

Twisden justice. As for the book of 2 Cr. it is but the opinion of *Fenner* and *Williams* against *Gawdy*, and *Coka* and *Dyer* are for a *Capiatur*, and therefore it seems it should be * so; but if the precedents are *Misericordia* it will alter the case. *Et adjornat.* Mich. 44 E. 3. 42. b. pl. 47. Mich. 45 E. 3. 11. a. pl. 4.

* P. 203.

Cock

Term. Mich. 22 Car. 2. B. R.

Cock *versus* Honychurch.

TRESPASS and assault. The defendant pleads a con- Accord.
cord between him and the plaintiff, viz. that he should 1 Danv. Ab.
pay the plaintiff 3*l.* in hand, and should undertake to pay 240. p. 18.
the plaintiff's attorney's bill; and avers that he paid the 2 Keb. 696.
3*l.* and that he was always ready to have paid the attorney's
bill, but he never shewed him any. To this the defend-
ant demurred.

Powlet for the defendant. That it is a good plea.

The grand objection is, That here is no execution of this
agreement.

Resp. 'Tis an execution, for the payment of the 3*l.* is
made, and the agreement is not to pay, but to undertake
the payment of the attorney's bill, which is accordingly
done. And upon his undertaking, the plaintiff or the at-
torney may have a remedy, and so good according to *Piowd.*
11. *b.* and in *Peytoe's* case, 9 *Co.* 77. *b.* There was an
obligation given for payment of the money, and here is a
promise made, which are of the same nature.

Twisden justice. This accord is not good, because not
executed; and of that opinion was the whole court (*ab-*
sente Kelyng chief justice) and judgment was given for the
plaintiff.

Smith *versus* Smith, *Assumpsit.*

THE plaintiff declares, that he and the defendant were *Assumpsit.*
executors to *A.* and the defendant did receive all the 1 *Mod.* 284.
estate of the testator, whereas a moiety thereof did and 2 *Keb.* 695,
doth belong to the plaintiff, and that the plaintiff did threat- 703.
en the defendant to sue him to come to an account; and
thereupon the defendant, in consideration that the plaintiff
did promise to forbear the said suit, and to shew an account
concerning the estate of the testator, the defendant promised
to pay to the plaintiff 100*l.* The plaintiff avers that he
did forbear the said suit, and did shew an account to the
defendant, and yet that he hath not paid the 100*l.* Upon
Non Assumpsit pleaded, and verdict for the plaintiff,

* *Jones* moved in arrest of judgment. 1. The plaintiff * *P.* 204.
doth not set forth where he would have sued the defendant,
and perhaps it was in some court which had not jurisdic-
tion. 2. He avers that he shewed *quoddam Compotum*,
which is not good; but he ought to have said *Compotum*
prædictum.

Term. Mich. 22 Car. 2. B. R.

predictum. Dyer 70. b. Pasch. 1 H. 7. 19. pl. 4. But notwithstanding these exceptions, judgment was given for the plaintiff.

Pierſon *verſus* Riddley. *Replevin.*

Distress.
2 Danv. Ab.
636 p. 7
1 Vent. 105.
2 Keb. 701,
739, 745.

THE defendant avows the taking, for that he is seised of the manor of *A.* to which he hath a leet belonging, and that by custom time out of mind used, the inhabitants of *D.* used to send a constable to the said leet; and that he before *H.* his steward at *A.* held the said leet, and gave notice thereof at *D.* and that they did not send a constable, and thereupon the said steward imposed a fine of 39s. 11d. upon the inhabitants, and that he distrained the plaintiff for the said fine. The plaintiff traverses the custom, and found for the avowant.

And *Shafte* for the plaintiff moved in arrest of judgment for two causes. 1. Because the avowant ought to have alledged a custom to distrain for the fine, as well as for the sending the constable, which he hath not done. 1 *Leon.* 242. pl. 327. *Blunt verſus Whitacre*, 11 Co. 44. b. *Godfrey's* case; for it is against common right. 2. The fine is unreasonable.

Weston contra. To the 1st. A distress is incident to a fine of common right; and when he alledges a custom to impose a fine, a distress is thereby implied, and it differs from an amercement in a court baron.

To the 2d. All the ville is amerced, and 39s. is no great fine for a whole township.

Twisden justice. When a duty is raised by custom, a distress for that duty must be maintained by the like custom. *Sed adjornat'.*

Gibbs *verſus* Stratford.

Discontinuance
2 Keb. 702.

TRESPASS of false imprisonment. The defendant justifies by virtue of an arrest in obedience to a precept out of *Warwick* court, returnable *ad proximam Curiam*; and upon this the plaintiff demurs, because the process ought to be returnable on a day certain, and not *ad proximam Curiam*; for so the court not being held, the party may be perpetually imprisoned, and so is 2 Cr. 314. *Johns verſus Smith*, Dyer 262. b. pl. 33. 3 Cr. 105. *Leat verſus Jennings.*

Twisden justice. 'The case of *Dyer* was good enough not-

Term. Mich. 22 Car. 2. B. R.

notwithstanding that error; but the judgment was reversed for other errors, as appears, 1 Roll. 486. pl. 2. *Jeffson versus Luxen. Sed adjornat*.

Dominus Rex *versus* Lefingham. *Antea* 193.

INFORMATION. For that the defendant did outrageously make distresses upon his tenants, and was a perturbur of the peace and common oppressor; and upon Not guilty pleaded, the jury found him guilty.

Verdict.
2 Danv. Ab.
651. R. p. 1.
1 Lev. 109.
1 Vent. 97.
104.
1 Mod. 71,
288.

And *Jones* moved in arrest of judgment, 1. For that at the common law a lord was not punishable for distraining, and so no information lies therefore; but the party is to be amerced by the statute of *Marlb. cap. 4.* not fined, as he must be upon an information; and an action upon the case did lie at the common law. 2 *Co. Inst.* 107.

2. Admit that an information lies in this case, yet it is not good without shewing when he distrained, which is not done but in general, *his Tenants*, which is uncertain; and also he ought to shew how the distresses were unreasonable.

3. The information is, that he is *Perturbator pacis & Communis Oppressor*, which is too general; true it is, that *Communis Barreclator* without other circumstance is good, but in no other case, as *Communis Latro*, 29 *Aff. pl.* 45. a. as *Oppressor multorum hominum*, without saying *whom*, is not good. 2 *Roll.* 79. pl. 2. *Moor* 302. pl. 451. *Cornwall's* case.

Twisden justice. The information can never be made good, because too general; and information lies not for distresses, because private offences: and so judgment was staid.

Denovan *versus* Mascall.

DEBT upon an obligation, Conditioned to stand to the award of A. and B. Ita quod they make their award upon or before the 19th of February, and if they shall make no award, then to stand to the umpirage of such a one as the arbitrators shall chuse. And the words are: But if they do not award, then I bind myself to stand to the award of such umpire as they shall chuse. And upon *Nullum Arbitrium* pleaded, the plaintiff sets forth an umpirage, and the defendant demurs; and adjudged for the defendant; for though the arbitrators may chuse an umpire at any time during the continuance of their power, yet that umpire cannot

Award.
1 Danv. Ab.
541. P. 5.
1 Lev. 302.
1 Mod. 274.
1 Keb. 714.
Copping *versus*
P. 206.
Hurrier,
aate 187.

Term. Mich. 22 Car. 2. B. R.

not act till the arbitrators time is expired, which in this case is now. By *Twisden* and *Rainsford* justices.

Draper versus Blaney.

Writs.

1 Lev. 291.
2 Keb. 649,
657, 724.
2 Saund. 193.
Nedham ver-
sus Benet,
ante 171.

UPON a judgment in this court, a *Fieri facias* issued out; and upon a *Nulla bona ret'* in London, the plaintiff takes out a *Testatum Fieri facias* directed to the sheriff of *Montgomery* to levy the monies in the hands of the defendant executor. The sheriff returns, that this is a county in *Wales*, and that *Breve Domini Regis non currit in Wallia.*

And *Saunders* moved that the sheriff may be amerced, and amend his return. By the statute of 1 E. 6. cap. 10. the sheriffs of *Wales* ought to have their deputies in the courts at *Westminster*, and the sheriff cannot dispute the process of the court. 2. This writ doth lie in *Wales*. The question in the old books is concerning original writs, as *Quare Impedit*, &c. but no question concerning writs of execution, and by the statute of 27 H. 8. cap. 26. *Wales* is made parcel of the realm of *England*; and in 34 & 35 H. 8. cap. 26. there is a clause, *That all process for weighty causes shall be directed into Wales by the chancellor and council*, which is intended the judges. And here is a weighty cause; for unless this process be allowed, the plaintiff hath no remedy for his debt; for an action of debt lies not in *Wales* upon judgment given here.

Object. The statutes of 1 E. 6. cap. 10. and 5 E. 6. cap. 26. in the recital.

Resp. An original out of the chancery here doth not run in *Wales*, as in a county palatine; but a writ of execution doth. *Het.* 18. *Manser versus Lewys*, *Elegit* lies and a *Fieri facias*, 2 Cr. 484. *Carp's* case, a *Certiorari*, and by *Doderidge* a *Capias* upon a recovery, 2 Bulstr. 156. *Beds* versus *Piper*, and 54. *Hall* versus *Rotheram*. And afterwards it was adjudged an ill return by *Twisden*, *Rainsford* and *Morton* justices.

* P. 207.

* *Vivian versus Willet.*

Words.

1 Danv. Ab.
128. p. 40.
2 Keb. 718.

THE plaintiff declares, That he was at the time of the words spoken, and yet is, a merchant; and there being a communication of him the defendant spake these words of him: *I believe all is not well with Daniel Vivian; there are many merchants that have lately failed, and I expect no otherwise of Daniel Vivian.* After verdict adjudged for the plaintiff.

Wilfon

Wilson *versus* Armourer.

DEBT upon an obligation against the defendant as Heir. heir; the defendant pleads *Riens per discent*, and if- 1 Lev. 287.
sue taken that he had assets; and the jury find a special 1 Vent. 78.
verdict, viz. *That William Armourer the defendant's father,* 87, 106.
was seised in fee of the manor of D. and 8 April 1657. made 2 Keb. 642,
a feoffment to Bray and others of all the said manor, except the 643, 667, 719.
two meadows in question, during his life, to the use of the de- 3 Salk. 157.
fendant in tail; and whether the meadows excepted did de-
scend to the defendant, was the question.

And after argument at the bar several times, judgment was delivered by Mr. justice *Twisdal* in the name of the other judges for the plaintiff, *That the meadows did descend: Wherein these points were proposed.*

1. Whether the exception of these meadows for his life only, be a good exception? And resolved a void exception, because contrary to the rules of law to have a livery operate *in futuro*; otherwise perhaps it had been if the exception had been for years only.

2. Whether in this case the exception be all good, or all void? And as to this point some of the judges differed. This is a *Quare in Plowd. Quarries* 71. pl. 146. But though it be void, yet it doth amount to an indication of the intent of the feoffor, that the same should not be according to the limitations of the other lands. So *Plowd.* 85. Lease of an house with the lands thereto appertaining, though lands cannot properly belong to an house, yet it declares the intent of the party that it should pass, and so it is as much as therewith used. *Perkins* 13. *Dyer* 319. 11 *Co. Auditor Curl's case.* * And judgment was given for the plaintiff. *Vid. Dyer* 264. b. pl. 40. 1 *Andersf.* 52. pl. 129. * P. 208.

Dominus Rex *versus* Brown.

OUTLAWRY upon an inquisition for a *Deodand* for Deodand, the death of one *Barker*, *existen' infra ætatem quatuordecim annorum.*

Coleman moved to quash the inquisition, because no *Deodand* is due therefore. 1 *Stamf. cap.* 12. 3 *Co. Inst. Fitz. Corone*, 8 E. 2.

Twisdal and *Morton* justices. There is no reason for that opinion. *Mes adjornat.*

Term.

* P. 209.

* Term. Hill. 22 & 23 Car. 2. B. R.

Harrison *versus* Grosvenor. *Replevin* in *Essex*.

Distress.

2 Keb. 692,

704, 726, 823,

836, 841.

THE case was, sir *Thomas Smith* devised his estate to trustees in fee to such charitable uses as the lord Lumley, sir *Henry Hen*, &c. shall dispose. They declare 5*l.* to the poor of the parish of *St. Mary* in *Chester*; and the commissioners decree that the church-wardens and overseers of the poor of *St. Mary* shall distrain for this 5*l.* And upon this two questions were made: 1. Whether the commissioners may add a power of distress, where there was none by the original gift? And 2*dly*, Whether the commissioners in *Cheshire* can bind lands in *Essex* with such clause adjoined? Adjudged for the avowant in both points.

Term. Pasch. 23 Car. 2. B. R.

THIS term sir *Matthew Hale*, lord chief baron, was sworn chief justice of the *King's Bench* after the death of sir *John Kelyng*, who was a learned, faithful and resolute judge.

Term.

Butnet *versus* Holden.

A SCIRE FACIAS against an executor to have execution upon a judgment obtained against the testator. The defendant demands *Oyer* of the record, and by it it appears that the plaintiff brought an action upon the case upon a promise against the testator. And upon *Non Assumpsit* pleaded, a trial by *Nisi prius*; and between the trial and day in bank the testator died. The defendant pleads a debt due to him from the testator upon an obligation, and that he retains so much in satisfaction of his said debt, and that he hath not assets *ultra*. The plaintiff demurred; and the sole question rests upon the construction of the statute of 17 Car. 2. cap. 8. whether that act shall supply the death of the defendant, so as to make the judgment good against the defendant's debt; and after argument adjudged for the plaintiff.

Executor.
3 Danv. 388.
P. 13.
1 Lev. 277.
1 Mod. 6.
2 Keb. 549.
559, 592.
783, 803.

Sir *Matthew Hale*, Chief Justice.

Sir *Thomas Twisden*,

Sir *Richard Rainsford*, and

Sir *William Morton*;

} Justices.

Officer.

Mandamus.

1 Vent. 143,

153.

2 Keb. 802,

807, 810.

Isles, sexton of the parish church of *Kingsclere* in *Hampshire*, moved for a mandamus to be restored to his office: And the court gave time to consider, whether any precedents would warrant such a writ. And it was afterwards allowed.

Davison versus Hanslop. Assumpsit.

Executor.

1 Danv. Abr.

31. p. 11.

53. p. 33.

3 Danv. Ab.

380. p. 2.

2 Lev. 20.

1 Vent. 152.

2 Keb. 813.

THE plaintiff declares, That one *Fenwick* was in arrear to him in 100*l.* for an annuity, and that the defendant was bailiff and receiver of the rents of the said *Fenwick*, who appointed the defendant to account with the plaintiff, and to pay all which should be found in arrear of the annuity, out of the next rents due at *Martinmas*; and that upon an account there was 100*l.* found due to the plaintiff; and the defendant *adunc existens Receptor* of the rents of the said *Fenwick* assumed to the plaintiff, that if he would forbear the said arrears for a month after the said *Martinmas*, that he would pay the same, and avers, that he staid accordingly, and that yet the defendant hath not paid: Upon *Non Assumpsit* pleaded, a verdict was found for the plaintiff.

And *Weston* moved in arrest of judgment, for that it doth not appear that the defendant had effects in his hands at the time of the promise.

* P. 212. * *Per Curiam*. It shall be presumed that he had effects after a verdict, being alledged that he was *adunc Receptor*; and judgment was given for the plaintiff.

Theophilus

Term. Mich. 23 Car. 2. B. R.

Theophilus Green and others were indicted at *Justice Hall* Oath. in the *Old Baily* for refusing the oath of allegiance contained in the act of 3 Jac. cap. 4. And being convicted, judgment of *Præmunire* was given against them according to the directions of that statute; and they brought a writ of error; and by *Coleman* assigned for error, that the oath enjoined by that statute is not now in force, but expired with the death of king *James*: For that the words thereof are, *That king James is rightful king, &c.* and doth not mention his heirs or successors; and the statute says, *They shall take the oath*; and the indictment is, *For refusing the oath, in his Anglicanis verbis*, and sets forth the oath *verbatim*, and so it is not like 7 Jac. cap. 4. which orders taking the tenor of the said oath; and the words king *JAMES* shall not include his successors. *Moor* 176. pl. 311.

Hale chief justice. The constant practice hath been otherwise, and the same objection may be made to the oath in 1 Eliz. cap. 1. And the word *tenor* is as much as that it were *verbatim*; and the name of the person is only an instance of the thing intended, and the word *king* extends to his successors; and judgment was affirmed.

John Manning was indicted in *Surrey* for murder, for the killing of a man. And upon Not guilty pleaded, the jury at the assizes find that the said *Manning* found the person killed committing adultery with his wife in the very act, and flung a jointed stool at him, and with the same killed him; and resolved by the whole court, that this was but manslaughter; and *Manning* had his clergy at the bar, and was burned in the hand; and the court directed the executioner to burn him gently, because there could not be greater provocation than this.

* *Sacheverel versus Frogate. Covenant.*

* P. 213.

THE plaintiff's ancestor (whose heir the plaintiff is) seised in fee, demises to the defendant, rendering rent to the lessor, his executors, administrators and assigns during the term. And the plaintiff declares as heir, and the defendant demurs in law; and adjudged for the plaintiff. For though the reservation be but to the lessor, his executors, &c. and not to his heirs, as it ought to be to intitle the heir, yet it being (*during the term*) it shall run with the reversion. And the case of *Richmond* and *Butler*, 3 Cr. 217. is mistaken in the law, for the case there intended,

O 2

viz.

Heir.

1 Vent. 148;

161.

2 Lev. 13.

2 Saund. 367.

2 Keb. 798,

819, 833, 839.

Murder.

1 Vent. 158.

2 Keb. 829.

Term. Pasch. 24 Car. 2. B. R.

viz. 12 E. 3. *Fitzh. Affise* 86. is contrary, as appears by the *Antithesis* there used. And *Latch.* 274. *Wooton* versus *Edwyn* is without the words *durante termino*; and agreeing with this judgment is *Latch* 99. *Sury* versus *Brown*.

* P. 214. * Term. Hill. 23 & 24 Car. 2. B. R.

Mandamus.
1 Vent. 187.
2 Keb. 871.

MR. *John Amherst* of *Gray's Inn* being owner of ground adjoining to *Newgate* market in *London*, had some of his said ground laid to the said market for the enlarging thereof, and thereupon according to the acts of parliament of 19 Car. 2. cap. 8. and 22 Car. 2. prayed satisfaction from the city, and had a jury impanelled, who gave him five hundred pounds and upwards, and upon that verdict the mayor and aldermen refused to enter up judgment; and thereupon Mr. *Amherst* prayed a *Mandamus* to make them give judgment; and it was granted.

* P. 215. * Term. Pasch. 24 Car. 2. B. R.

Chimin.
3 Salk. 183.

NOTA. Upon an indictment against *Houghton* of *Somersetshire*, for stopping a way, it was declared to be the course of this court, that the offender is admitted to a fine upon his submission before verdict, if there be a certificate that the way is repaired. But if the party be convicted by verdict, such certificate will not serve, but the party ought to cause a *Constat* to issue out to the sheriff, who ought to return, that the way is repaired, because the verdict, which is a record, ought to be answered with matter of record,

Term.

* Term. Mich. 24 Car. 2. B. R. * P. 216.

R. THE lady *Broughton*, keeper of the Gate-house prison in *Westminster*, was informed against; and upon Not guilty pleaded, she was found guilty; and her crime was extortion of fees, and hard usage of the prisoners in a most barbarous manner; and after she had by her counsel moved in arrest of judgment, and could not prevail, she had judgment given against her, viz. she was fined one hundred marks, removed from her office, and the custody of the prison was at present delivered to the sheriff of *Middlesex*, till the dean and chapter should farther order the same, *salvo jure cujuslibet*.

Memorandum, This last vacation justice *Morton* died, and all this term his place was vacant.

* Term. Hill. 24 & 25 Car. 2. B. R. * P. 217.

THIS last vacation justice *Archer* was removed from sitting in the court of *Common Pleas*, *pro quibusdam causis mihi incognitis*; but the judge having his patent to be judge *quamdiu se bene gesserit*, refused to surrender his patent without a *Scire facias*, and continued justice of that court, though prohibited to sit there, and in his place sir *William Ellis*, knight, was sworn.

Also the day before this term began, justice *Wild* was removed out of the court of *Common Pleas* into this court, and sworn privately; and in his room baron *Windham* was sworn

Term. Hill. 24 & 25 Car. 2. B. R.

sworn to be one of the judges of the Common Pleas, and in his place sir *Edward Thurland*, knight, of the *Inner Temple*, the second day of this term was made serjeant at law, having his coif put on in the Treasury, and immediately sworn one of the barons of the *Exchequer*.

Also this vacation sir *Orlando Bridgman*, knight and baronet, was removed from being lord keeper, and in his place *Anthony* earl of *Shaftsbury*, was made lord high chancellor of *England*.

Also this last vacation *Francis Winnington*, utter barrister of the *Middle Temple*, was knighted, and made solicitor to the duke of *York*, and the first day of this term was called within the bar.

Serjeant *Baldwin* was made king's serjeant.

Blacket *versus* Lumley.

Error.
1 Vent. 240.
3 Keb. 103,
116.

* P. 218.

A WRIT of error to reverse a judgment given in the court of the royal manor of *Hexham* in *Northumberland*. In a *Replevin* the defendant avows for damage-feasant; the plaintiff pleads in bar to the avowry, that *Fenwick* was seised in fee of the manor of *Fallowfield*, and that he and all those whose estate, &c. have used time out of mind to have common of pasture *in loco in quo*, &c. for all his farmers and copyholders; and that he is a copyholder, and held of the said manor, and justifies for common belonging * thereunto. The avowant replies and traverses the prescription, and it is found against him; and judgment for the plaintiff; and now the errors assigned were, The *Venire facias* is ill awarded, for that it is *preceptum est per Seneschallum Cur. præd. quod Ven. fac. duodecim tam de vicineto de Hexam quam de vicineto Manerii de Fallowfield infra jurisdictionem, &c. quia nec, &c. quod sint hic ad horam secundam post meridiem hujus diei*.

1. 'Tis not *per Cur.* nor *per Seneschallum in Cur.* and it may be it was out of court, and process in private jurisdictions shall not be taken by intendment; and of this opinion were *Twissden* and *Wild*; but *Hale* chief justice *contra*, because 'tis returned the same day; and the court shall be presumed to be continued the whole day.

2. The manor of *Fallowfield* is not laid to be within the jurisdiction, as it ought to be, in the pleading of the prescription; and the saying in the awarding of the *Venire facias* that 'tis so is not sufficient. And to this opinion *Hale* agreed.

3. The

Term. Hill. 24 & 25 Car. 2. B. R.

3. The *quia nec* for *qui nec* is not good; but they ought to have put it at large, and not as 'tis in B. R. And *quia nec* is nonsense. And *Twisden* and *Wild* allowed this exception; but *Hale* chief justice did not; but upon the consideration of all the exceptions, judgment was reversed, and so pronounced.

Welch *versus* Bell.

TRESPASS was brought against four in this court, who appear, and judgment against them all, and they bring a writ of error here of a judgment given *coram vobis*, and assign for error, that one of the defendants, being an infant, appeared by attorney, whereas he ought to have appeared by his guardian; & *hoc parati sunt verificare prout Curia consideraverit*; and the defendant in the writ of error pleads *In nullo est erratum*, and now shews that here is no error assigned, because they conclude, *Et hoc parati sunt verificare prout Cur. consideraverit*, whereas they ought to have concluded to the country, according to *Telver. 58. King versus Gosper and Shire*; and *1 Bulst. 37. Barker's case*. But by *Hale* chief justice, it is well enough, for *parati sunt verificare prout Cur.* and without *prout Cur.* are all one. But it was adjourned.

*An information was brought in this court against *Baker*, * P. 219. a carrier, for putting in above five horses in his waggon, contrary to the statute of 22 Car. 2. and upon *Non culp.* pleaded, a verdict was found against him. And *Pollexfen* moved in arrest of judgment, because the statute gives other remedy for the penalty, viz. Distress, and doth not give an information.

Hale, chief justice. It seems the punishment was intended to be inflicted *flagranti crimine*, and if an information would lie, the king may bring it any time within two years. But it was adjourned.

Whaley *versus* Tankred. *Ejectment.*

UPON Not guilty pleaded, a special verdict was found, wherein the case was shortly this; *Charles Meynel*, tenant for 99 years, if he live so long, the remainder to *Edmund Meynel* in tail, 14 Oct. 1656. infeoffs the defendant and his heirs; and *Hill. 1656.* levies a fine *sur consance de droit come ceo*, &c. with proclamations, to the

Term, Hill, 24 & 25 Car. 2. B. R.

the same *Charles Tankred*, to the use of him and his heirs, who entered accordingly. 28 August 1661. *Edmund Meynel* died, *Charles Meynel*, 18 March 1664. died; 10 April 23 Car. 2. the lessor of the plaintiff, being eldest son and heir of the said *Edmund Meynel* entered, and whether his entry was lawful, was the question; wherein the single point was, Whether *Edmund Meynel* ought to have entered within five years after the fine levied, or shall have other five years after the death of *Charles Meynel*. And resolved *per totam Cur.* He shall have five years after the expiration of *Charles* his estate by his death; and that there is no difference between the lessee for life and lessee for years, as to this point, contrary to the opinion of the lord *Coke*, in *Prodger's case*, 9 Co. 106. and of chief justice *Catlin*, Plow. 374. a. and judgment was given for the plaintiff.

Prohibition.

Sir *Drayner Massingberd*, knight, was sued in the ecclesiastical court by *Cutberd*, by the name of sir *Drayner Massingberd*, knight and baronet; and 'tis pleaded there, that he is only knight and not baronet; and the court there disallowed the plea, and proceeded to excommunication; and *Darwyn* for sir *Drayner* moved for a prohibition; and it was granted.

* P. 220.

* *Mildway versus Case.*

Debt.

1 Vent. 233.
3 Keb. 111,
164.

DEBT upon an obligation by the plaintiff as sheriff, conditioned for the appearance of *White* in B. R. die *Sabbati proximo post quindenam Sancti Martini ad respondendum Willielmo Gulsion in placito debiti*. Upon demanding oyer of the condition, The defendant pleads, that the said *Gulsion* sued forth a *latitat* returnable the same day against the said *White*, *ad respondendum* the said *Gulsion* in *placito transgressionis ac etiam debiti*, and pleads the statute of 23 H. 6. And the plaintiff demurred, and the question was, Whether the variance between the condition of the obligation and the writ, vitiates the obligation by that statute; And it seemed to *Hale* chief justice, that it is not the same writ mentioned in the condition. And therefore for the defendant. But it was adjourned.

Mora

Term. Hill. 24 & 25 Car. 2. B. R.

Mors *versus* Slue. *Action on the Case.*

THE plaintiff declares against the defendant for not safe keeping goods delivered to his custody. Upon Not guilty pleaded, the jury found a special verdict, *viz.* That the defendant was master of a ship which lay in the river of *Thames*, near *St. Katherine's*, that the plaintiff delivered goods to him to transport. That the defendant received his salary from the owner of the ship; that there being three men and a boy in the said ship, persons unknown, about eleven o'clock in the night came on board with a pretended warrant to search for felons, and seized upon the persons in the ship, and took away the goods; and whether the defendant was guilty was the question, *viz.* Whether the master or owner of the ship should answer these goods; and resolved for the plaintiff.

Case.
1 Danv. Abr.
12. p. 6.
1 Vent. 190,
238.
2 Lev. 69.
1 Mod. 85.
2 Keb. 866.
3 Keb. 72,
112, 135.

* Metwyn *against* The Hundred of Iffleworth, * P. 221.

UPON the statute of *Winchester*. The defendant pleads, *quod ceperunt quendam Richard^{us} Dudley*, being one of the persons who robbed the plaintiff; and upon this issue was joined, and the jury find a special verdict, *viz.* That the said *Richard Dudley* being accidentally, or upon some other occasion, in the presence of sir *Philip Howard*, was there charged by sir *Joseph Ash* to be one of the robbers, and the said *Dudley* being in the presence of sir *Philip Howard*, a justice of peace of the said county of *Middlesex*, the said sir *Philip Howard* did undertake for him, that he should appear at the next sessions. That the said *Dudley* at the next sessions did come into the sessions yard, but did not render himself up to the court; And whether the said *Dudley* being in the presence of the justice of peace, and charged as aforesaid, was a taking within the statute of 27 *Eliz. cap. 13.* was the question by the jury. And it was adjudged for the defendant, that this charging of the robber was a taking within the statute.

Hue and Cry.
4 Lev. 4.
1 Vent. 118,
235.
2 Keb. 760.
3 Keb. 115.

Ofeley *versus* Sir George Warberton.

SIR *George Warberton* seized of two manors, to one of which he used to receive a rent issuing out a tenement held of one of them as he conceived, but of which he could not discern, and because the tenant refused to pay the same,

same,

Term. Hill. 24 & 25 Car. 2. B. R.

same, and sir George had no deed to shew for the said rent, he exhibited a bill to the chamberlaid of *Chester* against *Oseley* the tenant to discover the deed. To this *Oseley* answered that he had no deed concerning the said rent, and upon that answer the court at *Chester* ordered a trial at law, to try to which of the said manors the said rent did belong, and was payable. And *Jones* moved for a prohibition, because a court of equity cannot charge the inheritance of a man's land with a rent; and it was granted.

• P. 222. • *Winton versus Pinkney. Debt for Rent.*

Debt.
2 Danv. Abr.
501. p. 13.
2 Lev. 80.
1 Vent. 242.
3 Keb. 131,
137.

LESSEE for life makes a lease for years, which lessee for years surrenders to the reversioner, rendering rent; and resolved for the plaintiff, because 'tis a duty by way of contract.

Mosedel versus Middleton. Covenant.

Covenant.
1 Vent. 237.
3 Keb. 133.

THE plaintiff declares, that the defendant covenanted for the true imprisonment of *J. S.* who escaped, and that thereupon the plaintiff was sued, and was forced to pay the debt. The defendant pleaded the statute of 8 *H. 6.* and that the covenant was for ease and favour of *J. S.* The plaintiff replied, that the said covenant was entered into for better security, *Absq. hoc*, that it was for ease and favour; and the defendant demurred, and judgment was given for the defendant, *nisi*, because there was a covenant to pay chamber-rent, &c. which in itself is for ease and favour.

Term.

Term. Pasch. 25 Car. 2. B. R.

* P. 223.

Young *versus* Cage.

DEBT upon a bond. Judgment was had by default by the plaintiff as executor; and the attorney had left out, *Et proferat hic in Cur. Literas testamentarias*; but the plaintiff is called executor in the declaration; and the defendant having brought a writ of error, *Simpson* moved to have the record amended in this particular, and to have those words inserted. But it was denied, because whether the plaintiff was executor or not, is matter of fact, and 'tis no reason to allow that to be true, which may be otherwise, without any proof but the plaintiff's own suggestion.

Amendment.
1 Danv. Abr.
337. p. 46.
3 Keb. 138.

Term. Mich. 25 Car. 2. B. R.

* P. 224.

Syms *versus* Sym. Trin. 25 Car. 2. Rot. 672.

DEBT for rent. Upon special pleading the case was this; lessee for years dies intestate. In May 1669. administration was granted of his goods to A. who assigns this term to B. who assigns to C. who surrenders to the reversioner; afterwards a third person cites the administrator before the ordinary to repeat the administration, who confirms the same; then the third person appeals from that sentence to the dean of the arches, where the sentence is avoided, and administration granted to the appellant; and whether this avoidance of the sentence shall void all acts done by the administrator before the action, was the question. And resolved by Hale chief justice, Rainsford and Wild,

Executor.
2 Lev. 90.
3 Keb. 206.

Term. Mich. 25 Car. 2. B. R.

Wild, absente Twisden, That it shall not; but is the same in effect with *Packman's* case; and judgment was given for the plaintiff.

Dinsdale versus Iles.

Estate.

3 Danv. Ab.

234. p. 9.

1 Vent. 247.

2 Lev. 88.

3 Keb. 166,

207.

TRESPASS for taking of goods. The defendant pleads that he let the land where the taking is supposed to be, to *Iles* at will, rendering rent at *May-day*, and the feast of *St. Martin* the bishop, in winter; and for rent arrear at *Martinmas* 21 Car. 2. the defendant justifies the taking the goods as a distress. The plaintiff replies, and confesses the lease; but farther, That before the rent became due, viz. in *August* 21 Car. 2. the defendant let the same land to *Iles* for years, rendering rent, who entered and was possessed; and so the lease at will to *Iles* was determined. The defendant rejoins, that in the said lease it was agreed, that the lessee should not enter till after *Martinmas*, *absque hoc*, that he entered *prout*. The plaintiff surrejoins, that he leased *prout*, *absque hoc*, that it was so agreed. And the * defendant demurs; and adjudged for the plaintiff, because the lease for years was a determination of the estate at will; and though upon the whole matter, and by virtue of the agreement it was a lease by computation from *August*, and in point of interest but from *Martinmas*; yet as this case is pleaded, where the plaintiff acknowledges the lease to commence in interest in *August*, the estate at will was determined.

* P. 225.

Fosset versus Francklin. Debt upon 2 E. 6.
for Tithes.

Tithes.

2 Danv. Ab.

620. p. 5.

3 Keb. 208,

217.

THE lands were parcel of the possession of the prior of *St. John of Jerusalem*, and came to the crown by 32 H. 8. cap. 24. and parcel of *St. John Wood* in the parish of *Marybone* and *Hampstead*, and whether they are discharged from payment of tithes, by 32 H. 8. cap. 24. was the question upon a trial at bar, and a special verdict found thereupon. But it seemed to *Hale* chief justice, that they shall not pay tithes, by reason of the word (*Privileges*,) And in *Whitty versus Weston*, *Bridgman* 32. *Latch*. 89. *Godbolt* 392. pl. 478. the court was divided. But 2 Cro. 57. *Moor* 913. pl. 1291. *Cornwallis versus Spurling*, in debt upon 2 E. 6. judgment was given that the lands are tithable; and so in a prohibition, 2 Brownl. 8. 20. *Urrey versus Bowen*.

Adjournatur.

Term. Mich. 25 Car. 2. B. R.

Adjournatur. But *Dyer* 277. b. pl. 60. is, that they are not tithable. And judgment was afterwards given for the defendant; and resolved the lands are not tithable.

The Bishop of Exon' and Master his Vicar General
versus Star.

DE B T upon an obligation of 20*l.* The defendant demands oyer of the condition, which is, *That whereas the defendant standeth excommunicated in the ecclesiastical court, and is to be assailed, If therefore he do abide by and stand to omnibus mandatis Ecclesiæ, that then, &c.* The defendant pleads, that he gave this bond to be freed from excommunication, and that the same is void in law, and so he ought not to be impleaded thereupon. The plaintiff demurs generally. *Master* for the plaintiff, The single question is, Whether a bond given for caution be good? * It is clear, that before an excommunicate person be assailed, he must give caution, and to compel the ordinary to take the same a writ lies at the common law, *De Cautione admittenda*, F. N. B. 63. *é.* which must be *idonea Cautio & ad parend' mandatis Ecclesiæ*, *Regist. Orig.* 66 and 67. And an action upon the case lies against the bishop for not taking such caution, if the person excommunicated requires it, *Co.* 2 *Inst.* 623. or the bishop may be indicted, *ibid.* But what is *Idonea Cautio* is left to the spiritual court to determine; and our law is not judge thereof. And there are three sorts of cautions, 1. *Juratoria*, when the party is poor and can give no other security. 2. *Fide-jussoria*, by bond or other security. 3. *Pignoratitia*, by pledge, as plate, money or other goods; and this is mentioned, *Regist.* 66. a. 67. b. It is called security, *Flet. lib.* 6. cap. 45. Page 438. *& Canon Aug.* 354. *Caution upon Marriage.* 2. This caution must be the act of the party excommunicate, he must tender it, and the judge is not bound to require it. 3. This caution by an obligation is more for the ease of the party than a pledge. 4. 'Tis the constant practice and use of the ecclesiastical court. 'Tis not void by the common law, because it is to do a lawful thing. It is not void by statute law, nor within 23 *H. 6. cap.* 10. and 5 *Eliz. cap.* 23. saves the right and jurisdiction of the bishops.

Object. 1 *Bulst.* 122.

Resp. 2 *Inst.* 615. If the cause be of ecclesiastical cognizance, the temporal court will not intermeddle therewith; and

Excommuni-
cation.
3 *Danv.* 279.
p. 1.
1 *Vent.* 166.
2 *Lev.* 36.
2 *Keb.* 814.
836, 848, 873.
3 *Keb.* 219,
285.

* P. 226.

Term. Mich. 25 Car. 2. B. R.

and in *Homine Replegiando*, the party must put in pledges; and find *sufficientem cautionem*. *F. N. B.* 66.

Jones for the defendant. He made three points. 1. If any bond ought to be given to the bishop. 2. If this bond be good in law. 3. Admit it not to be good, then whether it may be avoided by plea.

1. There ought not any bond to be given to the bishop. True it is *F. N. B.* 63. speaks of caution, but not of security by bond; and *Regist.* 66 and 67. describes the caution to be *pignoratitia*; and the reason is, because the caution is controllable by the successor, and not by the executors of the bishop, as it will be in case of a bond.

2. This bond is not good, because the same ought to be given to the bishop, or to his surrogate; and here it is given to the bishop and his vicar general.

And as to the *objection*, That it is the usage and practice, 'Tis answered. Such usage never came judicially in question.

* P. 227. * This bond is void by the common law, *Moor* 864. pl. 1191. *Slawny* versus *Elbridge*; in case of distribution, *Stile* 456. *Davies* versus *Mathews*. And here it will be a vexation to the people to have bonds put in suit against them.

Hale chief justice. The case in *Bulstr.* is by the whole court, that such bond is not good; and the case of distribution hath been variously ruled, till the late statute.

Wild justice. Such bonds have been frequent, and have been allowed in *C. B.*

Hale chief justice. A bond conditioned to perform a by-law hath been ruled naught. *Adjournatur*.

King versus Welby.

Prohibition.
3 Keb. 221.

THE plaintiff had a judgment at law against the defendant, who exhibited his bill in chancery to be relieved against this judgment, and the plaintiff pleaded this judgment, and over-ruled. And the plaintiff by *Sanders* moved for a prohibition, grounding his suggestion upon the statute of 4 H. 4. cap. 23. *Et adjournatur*.

And afterwards *Hale* chief justice directed, that the plaintiff should move the court of chancery to have the plea set down again to be heard, and when it should be over-ruled again, then the court would consider whether a prohibition should be granted.

Wright

Term. Mich. 25 Car. 2. B. R.

Wright *versus* Woodhouse.

TRESPASS for entering his house, and taking a cup of silver. The defendant justifies by virtue of a clause in the act of 16 Car. 2. cap. 2. *That if any person occupying any hearth or stove, chargeable to his Majesty, shall leave any house before any of the half-yearly feasts, whereon the same is appointed to be paid; the next occupier thereof shall be chargeable with the same for the said half year, and that the plaintiff was next occupier to him who was in arrears.* The plaintiff demurs; and adjudged for the defendant; And now *Winnington* moved for the defendant to have treble costs, according to the act of 14 Car. 2. cap. 10, which gives treble costs against any plaintiff, who shall have judgment against him in any action brought for acting by that act; and the court doubted whether this act * of 14 * P. 228. Car. 2. be a continuation of 16 Car. 2. as to this particular. *Et adjournatur.*

King *versus* —

TRESPASS *quare clausum fregit pedibus ambulando* & *prostrernere fenes*, continuando transgression. *præd.* from such a day to such a day, *ad damnum*, &c. And after verdict, Upon *Non. culp.* it was moved in arrest of judgment, because there can be no *continuando* in breaking of fences. As if I bring an action of trespass for taking my horse, and using him twenty days; I cannot lay it with a *continuando*. So for cutting of trees. Mich. 20 H. 7. 3. pl. 7. 2 Roll. 549. pl. 5. *Et adjournatur.*

Pybus *versus* Mitford. *Ejectment in Northumberland.*

Intr. Trin. 24 Car. 2. Rot. 703. B. R.

OF the demise of Gray and his wife. Upon Not guilty, the jury found a special verdict, That *Michael Mitford* was seised in fee, and had issue two sons, viz. *Robert* by his first wife, and *Ralph* by his second wife, whose name was *Jane*, and so being seised 23 Jan. 21 Jac. by indenture covenanted to stand seised of the lands in the declaration mentioned after the date of the indenture, to the use of the heirs males of his body begotten on the body of his wife

Term. Mich. 25 Car. 2. B. R.

wife *Jane*, with remainders to his own right heirs, and dies. 16 Car. 1. *Robert* enters and levies a fine to the use of himself and *Mary* his wife, and the heirs of their bodies, and dies without issue. *Mary* marries the lessor of the plaintiff; the defendant *Ralph* enters, and the jury concluded, That if any use did arise to *Ralph* by the said indenture of 21 Jac. then they find for the defendant, otherwise for the plaintiff.

Jones solicitor general for the plaintiff. That no use arises to the issue of the second wife. Here are two points. 1. If by this covenant an estate be raised by way of future use, to commence after the death of *Michael* the covenantor. 2. Admitting that no estate do arise, whether an estate by implication does arise to the heirs of the second wife.

1. No estate arises here as a future use, for these reasons. * P. 229. * 1. An use may arise *in futuro* to a person *in esse*; but it cannot be limited to one in being, to commence after the death of the covenantor, because a covenant shall not bind the heir, where the ancestor is not bound, and (*ergo*) a covenant that land shall remain to *A.* after my death, doth not raise an use. 21 H. 7. 18. pl. 30. *Dyer* 55. a. pl. 3. *Hob.* 313. 2. Whether this shall amount to a covenant to stand seised to the use of him and the heirs of his body; and I hold it doth not. 1. Here appeareth no intent to charge the estate in the life-time of the covenantor. Suppose I covenant, that after the death of *J. S.* I will stand seised to the use of *J. D.* that is by way of future use.

Object. 1 Co. 129. a. Covenant, that after his death his son shall have his land, raises a use to the son.

Resp. That case is only alledged by counsel, and not by the judges. And *Winch* 61. *Buckley* and *Simond's* case is contrary, and so is *Mitford's* case. *Coke on Litt.* 22. b. And a man cannot make his right heirs purchasers.

Levinz for the defendant. 1. Here is a good use raised to *Michael Mitford* the father by implication, *viz.* To him for life, the remainder to the heirs of his body; and this appears by the lord *Paget's* case, 1 Co. 154. a. Where the estate to *Farmer*, and others, during the life of the lord *Paget* being void, and the other estates not being to commence till after his death; the lord *Paget* was resolved to have an estate for his life by implication. 1 *Anderson* 263. pl. 270. *Moor* 284. pl. 437. *Fenwick* versus *Mitford*. 1 *Anderson* 288. pl. 297. 1 *Leon.* 182. pl. 256. 1 *Leon.* 101. pl. 133. *Allen* versus *Palmer*. Surrender to the use of the right heirs of the copyholder; and it is frequent for uses to arise by implication, 2 *Leon.* 218. pl. 275. *Hum-*
phreton's

Term. Mich. 25 Car. 2. B. R.

Sherton's case, The mind of the party doth direct the estate. 1 *Anderson* 245. pl. 258.

2. Admit that there cannot be such an use by implication; yet this is a good use to commence after his death, as a new springing use.

Object. This covenant shall operate by way of contract.

Resp. It may do so in a subject proper for it; but here the land is bound by it. As to the case of *Dyer* 55. a. it is not a covenant to stand seised; for if it had been so, an use would have arisen. 2 *Roll.* 388. pl. 1. *Buckler versus Simmons*. And here the covenant would be void if it did not raise a use; and springing uses frequently happen upon a contingent. 1 *Co.* 155. b.

* *Hale* chief justice. If a man covenant to stand seised after his death, it will raise a use to commence after his death, as well as during his life; for though the heir is not bound where the ancestor is not bound, yet land may be charged in the hands of the heir by the ancestor, and a use doth charge the land; but there may be improper words to charge the land, as the case of *H.* 7. and *Dyer* 55. is.

If *H.* covenants to stand seised after his death to the use of *J. D.* he hath the fee till his death. *Paget's case* comes not home to this case, because there was only an estate for life drawn out, and no contingent use. Here are clauses in the deed, which shew that it was never intended that there should be an immediate estate upon the heir. *Adjournatur.*

Winnington for the plaintiff. Here are three points. 1. If here be a contingent use raised? *And I hold there is not.*

2. Whether any estate arises to the covenantor by implication? *And I hold there doth not.* 3. Whether the issue by the second venter shall not take by purchase? *And I hold he shall.*

1. A future use may be raised upon a contingent. *Plowd.* 301. *Sherington versus Pledal, & in futuro.* 2. Here is no estate-tail vested in the covenantor, because no intent of the parties so to have it; but by implication he hath an estate for his life. The covenantor is in of his ancient seisin till the use arise, and not as in case where a use arises by transmutation of possession; and here is a new use raised, and therefore *Michael* could not be in of an estate-tail executed. 3. *Ralph* shall not take as a purchaser, for here is a description of the person, rather than a limitation of the estate.

Saunders for the defendant. *Ralph* here shall take quasi by descent. *Adjournatur.* And judgment given for the defendant.

Term. Mich. 25 Car. 2. B. R.

Bradley versus Hutchinson, Executor.

Amendment.

A SCIRE FACIAS upon a judgment in debt. The defendant pleads *pleinment Administ're* generally; and the plaintiff demurs specially for that cause.

And *Jones* solicitor general moved to amend the plea, because the defendant ought to have pleaded specially.

* P. 231.

In a *Scire fac.* upon a judgment this plea was adjudged naught in B. R. *Pasch. 1659.* by Glyn ch. just.

* *Hale* chief justice. The judgment binds the goods, and therefore it shall be presumed that the same were rightfully administered.

Twisden justice. It hath been adjudged a good plea; but let the plea be amended, if the defendant will.

Okeover versus Overbury. Error, Fine in C. B.

Error.

1 Vent. 252.
3 Keb. 259.

IN a writ of error to reverse a fine, infancy is assigned for error, and a *Scire facias* issues to *Overbury*, tenant and confessee, who pleads *In nullo est erratum*.

Hale chief justice. When error in fact is well assigned for error, *In nullo est erratum* amounts to a confession of the fact; as if infancy be assigned, the plaintiff cannot plead *In nullo est erratum*, because by it he confesseth the infancy, but he ought to take issue; but if the party assign for error, that the court did not sit, or that the defendant did not appear, which assignments are of matters of fact, but not well made, there *In nullo est erratum* amounts to a demurrer.

Captain Waters being a captain in the foot guards, and his serjeant rescued one of his soldiers of his company from the custody of the sheriffs of *London*, and for that offence an information was exhibited against them, and they came into court and confessed the fact; and upon that confession judgment was given against them, and the captain was fined 100*l.* and the serjeant 50*l.* and imprisonment awarded against them until payment of the same.

Southam versus Allen, for Words.

Words.

THE plaintiff is a keeper of livery stables and an inn at the *Bell-savage*; and the defendant had other stables for the same purpose, in the same yard. A stranger comes with a waggon into the yard, and demands of the defendant,

Term. Mich. 25 Car. 2. B. R.'

defendant, which is *Belfavage-Inn*? the defendant replied, *This is Belfavage-Inn, deal not with the plaintiff, for he is broke, and there is neither entertainment for man or horse*; and after verdict for the plaintiff, and great damages, judgment was given for the plaintiff after much debate.

* *Baker versus Bulstrode.*

* P. 232.

DEBT upon an obligation, upon condition that the defendant shall well and sufficiently execute, to the satisfaction of the plaintiff's counsel, a release within seven days after a decree of a moiety of the money decreed. The defendant pleads, that the plaintiff did not tender any release. The plaintiff demurs.

Hale chief justice. If advice had been necessary, then the plaintiff must have done the first act, but now it is at the peril of the defendant, that the release be to the satisfaction of the plaintiff's counsel; and judgment was given for the plaintiff.

Prideaux versus Warne. Replevin.

FOR taking of a sail of a ship; the defendant avows the taking, for that he is seised of the manor of *Padstow*, within which there is a common key, extending from such a place to such a place, for the unlading of salt, and that he and all those, &c. have used to repair the said key, and have kept a bushel for measuring of salt, and that they have had of every ship arriving there, laden with salt, one bushel of salt; and that the plaintiff had a ship arrived at the key laden with salt; and because a bushel of salt was not paid according to the prescription, he avows the taking of the said sail. The plaintiff pleads in bar of this avowry, that the river upon which this key is pretended, is a great rivea of ten miles breadth, and that the key extends but half a mile, and that the ship arrived seven miles distant, *Abfq; hoc*, that the said ship did arrive at the key within the said manor. The defendant demurred.

Pollexfen for the avowant. 1. Whether this be a good prescription without keeping a bushel, or repairing the key? and it seems it is. 21 H. 7. 16. *Br. Prescription* 92. 3 Cro. 710. *Dyer* 352. b. And the not coming up to the key makes nothing against the avowant, because he can come up if he please. Co. 2 Inst. 222. *Murage. Roll. Prescription* 265. for *Dublin, Trenchage*, 1 Leen. 231.

P 2

Object.

Term. Mich. 25 Car. 2. B. R.

Object. 'Tis out of the manor.

Resp. He may claim such a privilege in another manor.

- * P. 233. * 2. The taking of the sail is lawful, because, 1. Though it is not the goods of him who ought to pay the duty; yet it is well enough, for that is not necessary. *Pasch.* 21 Car. 2. *Welch versus Bell.* 1 Roll. 666. *Agard versus Lisle.*

Courtney contra, for the plaintiff. It is no good prescription, because it hath no good foundation nor meritorious consideration. For 1. Reparation of the key extends only to ships lying at the same to lade and unlade; and the keeping of a bushel is no cause, no more than the case of aulnage, 1 H. 4. 14. *Dyer* 117. 2. This is a duty from the merchant, not from the ship. 3. The sail is an unreasonable distress, because it disables the whole ship.

Hale chief justice. This prescription is only for a wharf, not for a port, and here ought to be reasonable recompence for the prescription. For *Magna Charta* says, *Omnes Mercatores peregrinos*, &c. without unreasonable toll; and he who hath a port ought to find and provide weights and measures, and other things. And in this case the avowant may as well prescribe to the confines of *France*, and therefore it is not a good prescription; as the case of the Belman of *Litchfield, More*; And it is not said what salt was in the ship, and there may not be above two bushels; and therefore judgment was given for the plaintiff.

Taylor versus Holmes. Error in Northampton.

Actions.

- 2 Lev. 107.
3 Keb. 264,
276, 296,
302, 335.

ASSUMPSIT and *Trover* in one declaration. The defendant pleads as to the *Assumpsit*, *Non Assumpsit*, and as to the *Trover*, *Non Culp.* The jury find, as to the *Assumpsit* for the plaintiff; and as to the *Trover* for the defendant, and the joining of these two actions in one declaration is assigned for error; and adjourned; but it seemeth not to be good.

Lomax versus Armourer. Error in Newcastle.

Error.

- 3 Danv. Abr.
94. p. 11,
1 Lev. 98,
123.
1 Vent. 267.
3 Keb. 277,
326, 421.

DOWER in *Newcastle* by plaint there. And the error assigned is, That freehold is not pleadable without original writ. *Brit.* 128. b. F. N. B. 77. b. Co. Inst. 2. 282, 311. *Intr.* 429. 3 Cr. 101. *Marshall versus Hobs*, as to fines, * 44 E. 3. 28. 37. 50 *Aff.* 9. But fines and real actions differ, for a fine is an amicable suit, & cont. 3 Cr.

* P. 234. 114, 116. *Owen* 93. *Et adjournatur.*

Bellew

Term. Mich. 25 Car. 2. B. R.

Bellew and *Norman*, *Frenchmen*, were condemned for clipping, and judgment given by the second judge, only to be drawn and hanged, *contra al Coke*. But by all the justices, this offence of clipping is made treason by the statute of 3 H. 5. cap. 6. and is of the same nature with coining, the punishment and judgment whereof is only drawing and hanging, because so the judgment was at the common law; and the statute of 25 E. 3. cap. 2. which declares what shall be treason, doth not appoint the judgment; and by the common law the judgment for coining was drawing and hanging for a man, and burning for a woman. *Fleta*, l. 1. cap. 22. *Vide Dyer* 230. b. pl. 55.

Treason.
2 Lev. 98.
1 Vent. 254.
3 Keb. 278.
Co. 3 Inst. 17.

1 Cr. 383.
Morgan's case.

Term,

* P. 235. * Term, Mich. 26 Car. 2. B. R.

Sir *Matthew Hale*, Chief Justice.

Sir *Thomas Twisden*,
Sir *Richard Rainsford*, and } Justices.
Sir *William Wild*,

*Dunkin versus Frances Mun Widow, Administratrix
with the Will annexed of Quarles Brown during
the Minority of Margaret Brown.*

Devise.

THE case was, that in 1663. *Quarles Brown* made his will in writing, and made *Michael Dunkin*, the plaintiff's father, and three others his executors, in trust for *Margaret*, and died. 1667. administration, with the will annexed, was granted to the said *Michael Dunkin* the father. In October 1673. *Michael Dunkin* the father makes his will, and the plaintiff his executor, and dies; the defendant takes out administration of *Quarles Brown*'s estate for the use of *Margaret*, and puts in a caveat against the now plaintiff's proving his father's will, and prays that the said will may not be proved till a commission of appraisement hath issued out, to appraise the goods of *Michael Dunkin* deceased, and a commission of inspection to view the books, papers and writings of the said deceased, and had them. The plaintiff appeals to the delegates, where *Mun* put in her allegations.

And the plaintiff moved by sir *Francis Winnington* for a *Mandamus* to be directed to the judge of the prerogative court to command him to proceed in proving the will; and alledged *F. N. B. 63. de cautione admittenda*, and the case of the *Christs*, and *Gold's* case, 1652. and the rather, for that the will is not controverted, but the probate stopped for a collateral cause; and the *Mandamus* was granted by the three * judges, *absente Hale*. Nota; The suggestion for the *Mandamus* was brought into court, and read before the

* P. 236.

Term. Mich. 26 Car. 2. B. R.

the *Mandamus* granted. *Vid. F. N. B. 200. a. Ex grave Querela* to inforce the mayor of *Oxford* to prove a will.
Et ibid. a. A writ lies to the ordinary.

Benson *versus* Hodson.

Pasch. 26 Car. 2. *Intr. Hill.* 25 & 26 Car. 2.
Rot. 696.

A. Tenant for life, the remainder to the use of *B.* in Remainder.
tail, remainder to *C.* in tail, remainder to the heirs 1 Lev. 28.
of the defendant. Provided that *A.* shall have power to 1 Mod. 108.
make leases for years in possession, reversion or contingency. 3 Keb. 274,
A. makes a lease for years, to commence after the death of 287, 292.
B. without issue.

By *Hale* chief justice, *B.* may bar this lease by a common recovery, although this arise precedent to the estate-tail, because it is in continuance of the estate of *B.*

Williams *versus* Fry.

Mich. 22 Car. 2. Rot. 392. B. R.

EJECTMENT for *Newport* house of the demise of Condition.
George Porter. Upon *Non culp.* a special verdict. 2 Danv. Abr.
The earl of *Newport* was seised in fee, and had issue three 10. p. 9.
sons yet living, and two daughters, *Anne* and *Isabel*; *Isabel* 30. p. 2.
married the earl of *Banbury*, by whom she had issue *Anne*, 2 Lev. 21.
now defendant; the other sister *Anne* was married to *Thomas* 1 Mod. 68.
Porter, by whom she had issue *George Porter*, the lessor of 1 Vent. 199.
the plaintiff. 8 Feb, 18 Car. 2. the earl of *Newport* made 2 Keb. 756,
his will in writing, and devised the house to his wife for her 787, 814, 867.
life, remainder to the defendant *Anne* and the heirs of her 3 Keb. 19.
body, under this condition (on which the case depends) viz.

Provided always and upon condition. that if my said grandchild do marry without the consent of my said wife, Charles earl of Warwick, and Edward earl of Manchester, and the major part of them; and in case the said lady Anne Knowles do or shall marry without the consent of the major part of my said trustees, or shall happen to depart this life without issue of her body, then I will and bequeath the said premisses unto my grandchild George Porter, son of my said deceased daughter lady Anne, late wife of Thomas Porter, and his heirs for ever. P. 237

18 Aug. 1667. *Anne* marries *Christopher Fry* without the consent

Term. Mich. 26 Car. 2. B. R.

consent of the countess of *Newport*, earl of *Warwick*, and earl of *Manchester*, and the said *Anne* had not then notice of the will of the said earl of *Newport*, and then she was but of the age of fourteen years.

Resolved 1. It is a limitation, and not a condition; tho' the words are the express words of a condition, yet they must always be conformable to the intention of the parties. *Dyer* 317. pl. 5. 3 Co. 21. 3 Cr. 833. 2. 591. 3. 376. 2 Leon. 31. *Owen* 8. *Roll. Abr.* 411. By which cases it appears that words of condition in a will shall enure as a limitation; and though in *M. Pertington's* case 10 Co. it is said otherwise, yet that is but an accumulative reason, which was not necessary.

Resolv. 2. Notice of the condition was not necessary: 1. None is appointed by the deviser to give notice. 2. No body is concerned to give notice, the heirs and executors have nothing to do therewith. 3. All parties had equal means of coming to notice; and if notice be requisite it might be a means to avoid the will of the deviser. 2 Cr. 119. 1. 575. 4 Co. 82. 5. 110. 1 Co. 391. 4. It is a thing which concerns his own interest, which is the true reason of *fir Andrew Corbet's* case. 5. It was not impossible for the defendant to have inquired and informed herself; and if she remains ignorant and not informed, it is her own folly. 1 *Roll. Abr.* 463. *Hob.* 68.

As to *Francis's* case, 8 Co. 92. there the party had other means to claim besides the will, and should not need to take notice of the will. But in our case the will is the only way to claim the estate, and therefore the defendant ought to take notice thereof. As to the case 2 Cr. 144. *Molineux*, It lies there properly in the consufance of the younger son, that the legacies be paid or not, &c. and differs from this principal case. And so judgment was given by the whole court (*absente Morton*) for the plaintiff. *Finch* attorney general, *Jones* king's counsel for the plaintiff. *North* solicitor, and *Winnington* for the defendant.

* P. 238. * Memorandum, Quod decimo sexto die Octobris anno Regni Regis Caroli Secundi 29. Annoque Domini 1677. recepi Breve Domini Regis, quod sequitur in hæc verba: Carolus secundus, Dei gratia, Angliæ, Scotiæ, Franciæ & Hiberniæ Rex, Fidei defensor, &c. Dilecto & fideli nostro Thomæ Raymond Armigero salutem, Quia de advisamento Consilii nostri ordinavimus vos ad statum & gradum Servientis ad legem a die Sancti Michaelis prox. futur. in tres septimanas suscipiend. Vobis mandamus firmiter injungend quod

Term. Pasch. 26 Car. 2. B. R.

quod vos ad statum & gradum prædict. in forma prædicta suscipiend' ordinetis & præparetis, & hoc sub pœna mille librarum nullatenus omittatis. Teste meipso apud *Westm.* tertio die *Julii* Anno Regni nostri vicesimo mono.

Sur le Label sic inscribitur, Dilecto & fideli nostro *Thomæ Raymond* Armigero ad statum & gradum *Servien'* ad legem suscipiend' Ret. tres *Michaelis. Barker.*

In this call were thirteen serjeants, (*viz.*) of *Gray's Inn*, *Thomas Holt*, *William Gregory*, *Richard Weston*, *fir Robert Baldock*, My self and *fir Thomas Stringer*. Of the *Inner Temple*, *fir William Dolbin* recorder of *London*, *Richard Holloway*, *Thomas Street* and *John Simpson*. Of the *Middle Temple*, *Thomas Rawlins*. Of *Lincoln's Inn*, *Thomas Strode* and *fir John Shaw*. The inscription of the rings, *Gratia Regis, non operibus Legis.*

* Term. Pasch. 26 Car. 2. B. R.

* P. 239.

Wigson versus Garret. Ejectment.

THE earl of *Leicester* 21 *Eliz.* makes a settlement upon Power.
himself for life, the remainder to his issues, the re- 2 Lev. 149.
mainder to others, with power of revocation, by indenture 1 Vent. 278.
subscribed and sealed by himself, and to limit new uses. 3 Keb. 366,
The 26th of *Eliz.* he covenants to levy a fine to other 489, 510,
uses, and four years after levies a fine accordingly. And if 536, 572.
this indenture and fine make a revocation of the uses in the
first deed was the question. Resolved that it is a revoca-
tion, because that the deed and the fine are but one convey-
ance, and a case was cited in *Mich. 26 Car. 1. C. B. Rot.*
1442. *Ingram versus Parker*. Sir *William Catesby* makes a
conveyance to the use of himself for life, the remainder to
Robert his son in tail, with a proviso for him, or his son,
by deed under hand and seal to revoke. Sir *William* dies,
Robert, the son, by bargain and sale sells for 1000*l.* But
the deed was not inrolled, and after a fine was received,
and held by three justices that the fine was an extinguish-
ment of the power:

But

Term. Mich. 28 Car. 2. B. R.

But *Hale* chief justice doubted of the case to be law. And he cited dame *Hastings's* case, which was tenant for life with a remainder over, with a power to make a jointure. And the tenant for life covenants to stand seised to the use of his wife, for her life, for her jointure. Resolved a good execution of the power. In covenant by indenture that when *J. S.* pays 10*l.* he shall have his land, is a revocation. Judgment was given for the plaintiff.

• P. 240. • *Risley versus Dame Baltinglafs. Ejectment in the Exchequer.*

Devise.
2 Danv. Ab.
528. p. 8.

THE case was, *Temple* and two others were tenants in common of the manor of *Burton Dasset* in the county of *Warwick* in fee. *Temple* makes his will in writing of his third part, and after by indenture and fine partition is made betwixt the tenants in common; and if this partition be a revocation of this will was the question. And it seemed to all the barons, viz. *Montague, Littleton, Thurland* and *Bertie*, that it is not any revocation: But judgment was not given, because the plaintiff obtained leave to discontinue his action.

Term.

In the Exchequer.

The Attorney General *versus* Sir Edward Farmer.
By English Bill.

THE case was such, The king seised in fee of the manor of Halbeck in the county of Lincoln, grants it with the appurtenances, and also *Omnia fundum, solum, arenas, terras marefcales & omnes alias terras, quæ modo inundatæ existunt, & quæ fuerint impofterum recuperat de mari*, with a *Non obftante* the mifrecital, &c. The lands in question were under the falt water at the time of making the patent, and were fince recovered from the fea. And the fole queftion was, If thefe lands improved and recovered from the fea pafs by the faid grant?

Hols for the king. They do not pafs; 1. Let us confider what fhall pafs if it were the grant of a common perfon.

2dly, How this differs being now in the cafe of the king.

3dly, The nature of the thing granted.

The words are, *All the lands contiguous and adjoining to the fea*; what fignification thefe words fhall have; for if all the lands pafs, &c. it will extend to *Denmark*.

2. If this cafe be confidered as the cafe of the king. Every grant of the king ought to comprehend certainty; and therefore his grant of demefnes doth not comprehend copyholds, although it be otherwife in cafe of a common perfon.

3dly, This grant is of part of the fea, which being parcel of the prerogative, ought to be exprefly named; and the fea is the foil of the king, *Selden's Mare Clausum* 223. which refers to a proclamation of the king 7 Jac. mentioned in *Lex Mercatoria* 135.

Object. Here is a particular grant, and certain words, for they are *Quandocunque in pofterum recuperat fuerint per derelictionem maris*.

Refp.

Term. Mich. 28 Car. 2. In Scacc.

Resp. It is only a possibility, and therefore void; as if the king grants land when it shall escheat, it is a void grant.

* P. 242. 2. If * it shall be a good grant, it shall be of a freehold to commence *in futuro*, which the law permits not.

Wallop for the defendant. It is inquirable, 1. if the thing here be grantable by the king. 2. If here be sufficient words to pass it.

As to the 1st, Here is a capacity in the king, because he is absolute lord of the British seas, as appears by *Selden's Mare Clausum*, he may grant part of his marine patrimony as well as his lands. 2. Here is a person capable to take; subjects are capable of a property in the sea. *Selden's Mare Clausum*, lib. 1. cap. 15. pag. 60. *De jure Belli*.

As to the 2d, Here are words sufficient to pass these lands. True it is, that franchises or other things of prerogative do not pass without plain words; therefore a grant of *Bona felonum*, &c. will not pass the goods of one that stands mute and will not plead. *Mich. 8 H. 4. 2. pl. 2.* So the grant of the amerciements of his tenants doth not pass amerciements of them by the king as commissioners of sewers. 2 *Bulstr.* 235. The king against the earl of *Exeter*. But here the grant is not of a thing which is part of the prerogative; for the soil of the sea is in the king as part of his inheritance, and not as a thing of prerogative. 2 *Leam.* 158. By *Walmsly*. It was adjourned.

Term.

Sir Francis North, Chief Justice.

Sir Robert Atkins,

Sir Hugh Wyndham,

Sir William Scrözs,

} Justices.

Serjeant Barbe and others, Executors of John Pynsent, late Prothonotary of this court, Plaintiffs, versus Joshua Burton Gent. Defendant.

IN *Assumpsit*, the plaintiff declares that the defendant Assumpsit. Foxwell versus Tremain, ante 198.
 28 Aug. 1668. was indebted to the said John Pynsent in his life-time in 60*s.* *pro pecuniis ipsius Johannis Pynsent eidem Johanni Pynsent in vita sua debit' pro damnis Clericis ut un' Prothonotarior' Curiae Domini Regis de Banco hic & per ipsum Joshuam ad usum ipsius Johannis Pynsent ante tempus illud habit' & recept'*, the which he the same day and year promised to pay to the said John in his life-time upon request, the which he hath not done, to his damage of 20*l.* The defendant pleads *Non Assumpsit infra sex annos*. The plaintiff demurs; and adjudged for the defendant, that this debt for damage clere is within the statute of 21 Jac. because it rises out of the action, and not grounded on the record.

* P. 244.

* Term. Trin. 30 Car. 2. C. B.

This Term Justice *Scrogs* was made Chief Justice of the *King's Bench*, in the place of Sir *Richard Rainsford*; *Vere Bertie*, Baron of the *Exchequer*, made Justice in his place; and *Francis Brampton* Serjeant, Baron of the *Exchequer*.

Angel *versus* Cleypool.

Debt.

DEBT for 300*l*. The plaintiff obtains judgment by *Nihil dicit* five years ago; the defendant brings error in *Banco Regis*, and assigns for error, no original, and upon a *Certiorari* the *Custos Brevium* returns no original. And after the plaintiff procures an original, and upon enquiry in chancery the master of the rolls ordered that the writ should be set aside. And now serjeant *Barrel* moved that the writ should be set aside and taken off the file.

North chief justice, The order of the master of the rolls hath not any authority here, for if the *Custos Brevium* take it off the file he forfeits his office.

* P. 245.

* Term. Mich. 30 Car. 2. C. B.

Brooks *versus* Hague. *Assumpsit*.

Case.

3 Salk. 19.

3 Jac. cap. 7.

THE plaintiff counts specially as attorney, for several fees and sums of money by him expended in several suits for the testator of the defendant, and that he demanded them, and neither the testator nor the defendant had paid them. The defendant pleads the statute of 3 Jac. cap. 7. and

Term. Hill. 30 & 31 Car. 2. C. B.

and that the plaintiff had not given to the testator, nor to the defendant himself before the writ brought, any bill of charges according to the statute. Upon this the plaintiff demurs; and adjudged for the defendant, that it is a good plea.

* Term. Hill. 30 & 31 Car. 2. C. B. * P. 246.

Langley versus Chute. Prohibition.

THE plaintiff suggests that there is a custom time Prohibition. whereof, &c. within the parish of *Stretham* in the county of *Surrey*, that the churchwardens with the major part of the parishioners may order the seats in the church, and the churchwardens are to see to the repairs of them; and that the defendant libelled in the ecclesiastical court for the sole usage of a pew in the same church, and set forth in his libel, that one *Bedoile* 1611. being seised of the land within the parish, built an house upon it, and after in the year 1637. at his own cost built the said pew in the church for himself and his family, and sold the house and pew to the defendant *Chute* and his heirs, and by sentence in the ecclesiastical court the ordinary annexed the said pew to the said house, and that the defendant and his heirs enjoyed it. And that the churchwardens would have placed the plaintiff there, and the defendant libelled against the plaintiff in the ecclesiastical court. Now the plaintiff prays a prohibition, and alledges 2 Roll. 24. *Brabin versus Tredinam*, *Poph.* 140.

North chief justice. A prohibition shall not be granted, because the ordinary hath jurisdiction, and the churchwardens cannot justle out his authority, when the privilege is claimed only for the defendant and his family; because as to him and his heirs a prohibition lies, and if the plaintiff be grieved by the sentence, he may appeal. And the office of churchwarden is a kind of ecclesiastical office. True it is, the parishioners are to take care of the repairs of the church,

Term. Hill. 30 & 31 Car. 2. C. B.

church, as it appears, *Regist.* 44. b. but the ordinary hath of common right the ordering of pews in the church. If this suggestion should hold, the ordinary's jurisdiction would be totally set aside.

Wyndham and *Bertie* justices accordingly; but *Atkins* justice *contra*, That a prohibition lies, because this case doth not differ from the case of *Brabin*.

* P. 247.

* *Baynes versus Edward Belfon.*

Intr. Windford Trin. 30 Car. 2. Rot. 1496. Oxon,

Power.

EJECTMENT of the demise of sir *Thomas Curson* baronet: Upon Not guilty pleaded, the jury find a special verdict,

That sir *John Curson* being seised of the manor of *Waterbury*, of which the lands in question are parcel, by indenture, *Dat.* 12 Sept. 1654. in consideration of a marriage between his son *Thomas*, lessor of the plaintiff, and *Elizabeth* the daughter of *William Burrows*, and 1000*l.* portion, and for the affection he bore to his relations, covenanted to stand seised of the said premisses, To the use of himself for life, remainder to *Broom Whorewood*, *William Burrows* and *Elues* and their heirs, during the life of the said *Thomas Curson*, his son and heir apparent, remainder to the first, and every other son of *Thomas* successively in tail male, remainder to *John Belfon* in tail male, remainder to *Augustine Belfon* in tail male, remainder to *Edward Belfon*, now defendant, in tail male, with remainders over, with power for sir *John* to make leases to any persons for one, two or three lives, or for one and twenty years, reserving the ancient rent. That the marriage took effect between the said *Thomas Curson* and *Elizabeth Burrows*. That sir *John* 11 January 1655. demised the premisses to the said *Edward Belfon* for one and twenty years, to commence after the deaths of *Jacob* and *Meeks*, who were tenants for lives, and who lived several years after. That the said *Whorewood*, *Burrows* and *Elues* were not at all of kin to sir *John Curson*. That sir *John Curson* died before the said *Thomas Curson* had any issue male born. That afterwards *Thomas* had issue *John Curson*. That *John Belfon* and *Augustine Belfon* are dead without issue. That there was no other execution of the deed but sealing and delivery.

Croke

Term. Hill. 30 & 31 Car. 2. C. B.

Croke serjeant for the plaintiff. The questions upon this verdict are :

1. Whether the power to make leases being general, be good in this case ?

2. Whether sir *John* hath pursued the power in making a lease *in futuro* ?

* 3. Whether the uses limited (after the estates in tail male to the sons of sir *Thomas Curson*) to *John Belfon*, *Augustine Belfon* and *Edward Belfon* do arise, partly upon sealing the conveyance, or that the use continues in the covenantor till after the deaths of the sons without issue male ? * P. 248.

To the two first points. The whole court gave their opinions, *viz.* To the 1st, That the power to make leases being general, is void, it being upon a covenant to stand seised. *Mildmay's case*, 1 Co. 2 Roll. Abr. 260.

To the 2^d, The power is not well executed, the lease being to commence *in futuro*. 2 Roll. Abr. 261. *Telverton* 222. *Stokham versus Hawkins*, 6 Co. *Fitzwilliam's case*, and *Lepar and Wroth's case*, *Hob.* 151. *Colt's case*.

As to the 3^d point, *Croke* proceeds. The case is thus: *H. covenants to stand seised to the use of himself for life, remainder to the use of strangers and their heirs, during the life of Thomas Curson, remainder to the sons of Thomas Curson successively in tail male, remainder to Edward Belfon in tail.* The covenantor dies before any son of *Thomas* is born, and afterwards a son is born, whether *Edward Belfon* next in remainder will have the lands presently, or shall stay till all the issues be dead without issue male ? And I conceive *Edward Belfon* shall take immediately after the death of the covenantor.

1. Nothing passes to these strangers without inolment, 7 Co. *Bedel's case*, 11 Co. *Harpur's case*, 2 Roll. Abr. 783. *H. pl.* 4. and consequently nothing accrues to the sons of *Thomas*. And when a grant is made to two, and the one is capable to take, and the other not, the estate shall vest in the person capable only at the common law. *Perk.* 108. *b. pl.* 566. *Dyer* 300. *b. pl.* 39. and 309. *a. pl.* 67. *Moor* 494. *pl.* 687.

Object. This case differs, because it is in case of an use by covenant to stand seised.

Resp. There is no difference, 6 Co. *Fitzwilliam's case*, uses shall be expounded according to the rules of common law. And this way of limiting estates by covenant to stand seised begun in *Englefield's case*, and *Bainton's case*, and *Sherrington* and *Pledal's case*, *Plowd.* 301. And the statute incorporates the use to the possession, in case of a covenant to stand

Term. Hill. 30 & 31 Car. 2. C. B.

stand seised, as well as in other cases. And here sir *John Curson* covenanting to stand seised to the use of himself for his life, is in of a new estate, and not of his old estate.

* P. 249. * *Object.* Signior *Pagit's* case, 1 Co. 154. a. and *Moor* 193. pl. 343.

Resp. There is a great difference between this and that case; for there the lord *Pagit* had no estate for his life, but here the covenantor hath, and therefore the use here ought to vest immediately, *Hob.* 74. *Barnes's* case. And here the intent of the covenantor was that all estates should be out of him; and if the case should be otherwise, where should the estate be after the death of the covenantor? For *Thomas* cannot have the particular estate, and the inheritance also *simul & semel*, which he must have in this case, if the estate shall continue in the covenantor 'till the son of *Thomas* be born.

North chief justice. It seemed that this remainder vests immediately after the death of sir *John Curson* in *Belfon*, as *Lewis Bowle's* case is, 11 Co. 80. a. Adjourned.

Pont versus Pont. Partition.

Mich. 30 Car. 2. Rot. 559. *Winford.*

Ancient
Demesne.

IN a writ of partition betwixt tenants in common by the statute of 31 H. 8. cap. 1. the tenant pleads *Ancient Demesne*; and adjudged a good plea, according to the case betwixt *Grace* and *Grace*, 1 Roll. Abriag. 322. E. pl. 10. But here upon the record there were found several discontinuances, and therefore judgment was given for the demandant.

Carfey versus Wood.

Trin. 29 Car. 2. Rot. 1236. *Winford.*

Devise.

1 Cr. 525. *Af-*
tough's case.

EJECTMENT. A special verdict. A man seised in fee of lands held *in Capite*, devised the whole to the corporation of the city of *Norwich* upon a charitable use, and whether the devise be good for the whole, or only for two parts, was the question. And whether the statute of 43 Eliz. cap. 4. doth make a good devise contrary to the statutes of 32 & 34 H. 8. And resolved, It is good but for two parts only. And by *Maynard* serjeant, Where 'tis said, that if a copyholder devise without a surrender, or tenant in tail devise, that 'tis good against the issue, 'tis not intended good

Term. Hill. 30 & 31 Car. 2. C. B.

good by the common law, but to be made good by the decree of the chancery grounded upon the statute of 43 Eliz. cap. 4.

* Lucas *versus* How.

* P. 250.

EJECTMENT. Special verdict. The case was thus, Condition.
A man makes a lease for years upon condition that the lessee shall not assign over his term to any but his kindred, without licence from the lessor; the lessor assigns over the reversion, and the lessee assigns over his term and breaks the condition. And whether the grantee of the reversion shall take advantage of this condition is the question. It is a collateral condition as appears by Pennant's case, 3 Co. 64. a. and Stiles 265. Collins *versus* Silley.

And by *Atkins* justice, It is such a condition as is within the statute of 32 H. 8. cap. 34. But it seemed to others to be a collateral condition. And it was adjourned.

Stephens *versus* Hayns and others.

Trin. 30 Car. 2. Rot. 361. *Wryley*.

REPLEVIN for taking of five oxen. The defendant Chimin, makes cognisance as bailiff to the lord of the leet, because the plaintiff was amerced there for not scouring a ditch in an highway, and the plaintiff demurred, because the statute of 18 Eliz. cap. 9. gives the forfeitures for highways to the surveyors of the highways; but adjudged by all the justices for the defendant, because the party may be punished in the leet, and also by this statute for divers causes.

Johnson *versus* Coltson.

Trin. 30 Car. 2. Rot. 1463. *Winford*.

TRESPASS and battery. Upon *Non Culp.* a special Process.
verdict. The plaintiff being complained of to a justice of peace, he makes a warrant to the defendant to take the plaintiff, and to find sureties for the good behaviour; the defendant, being constable executes the warrant upon a Sunday, and whether good within the late statute which says, *That all process executed upon a Sunday other than for the peace shall be void.* Resolved for the defendant, that a warrant for the good behaviour is a warrant for the peace and more; and this statute is to be favourably extended for the peace.

Q 2

This

Term. Hill. 30 & 31 Car. 2. C. B.

* P. 251. This * judgment was affirmed in a writ of error in B. R. Frin. 32 Car. 2.

Memorandum, That on *Monday* the fifth day of *May* 1679. 31 Car. 2. I was sworn one of the barons of the *exchequer*, though I had laboured (and not without great reason) to prevent it. I was sworn at the same time with sir *William Ellys*, who had been formerly one of the justices of the *common pleas*, and put out, and now brought in again. He was allowed precedency to sir *Thomas Jones* and sir *William Dolben*, justices of the *king's bench*, because they were put in since his turning out; but this precedency was only by verbal signification from the king, and not expressed in his patent. With me was also sworn sir *Francis Pemberton*, to be judge in the *king's bench*; all of us were sworn at my lord chancellor *Finch's* house.

* P. 252.

* Gerrit Johnson *versus* James Grant.

Replevin. Middlesex.

Avowry.

THE plaintiff declares of the taking of divers goods 5 November 29 Car. 2. in a certain messuage of the plaintiff's situate in *Long-Acre*, in the parish of *St. Martin's in the Fields*, and detaining them against sureties and pledges, *ad damnum* 200*l*.

The defendant avows the taking, for that *ante prædictum tempus quo*, &c. one *Sarah Grant*, widow, being executrix of the testament of one *Samuel Grant*, the father of the said *James Grant*, gave to the said *James* security for payment of 600*l*. being a legacy given the same *James* by his said father, by his said will, which security the said *James ante prædictum tempus quo*, &c. surrendered to the said *Sarah*, and discharged her from the same, upon agreement that she should pay him yearly during his life *sol. per annum*, and should give him sufficient security for the same; That the said *Sarah* was seised of ten messuages, of which the said messuage *in quo*, &c. was one, in her demesne as of fee; and so being seised after the agreement aforesaid, in prosecution of the said agreement, *ante prædictum tempus quo*, &c. by indenture dated the sixth of *December* 1658. between the said *Sarah* of the one part, and the said *James* of the other part, did demise the said ten messuages to the said *James* (and sets them forth by metes and bounds) *Habend. from Michaelmas* last for ninety-nine years, if *James* should

so

Term. Hill. 30 & 31 Car. 2. C. B.

so long live. *Reddend.* a pepper-corn; by virtue whereof *James* entered and was possessed.

That he being possessed, by his indenture dated the seventh of *December* 1658. demised the same to the said *Sarah* for ninety-eight years, if *James* should so long live; *Reddend.* the first year a pepper-corn, and the residue of the said term 8*ol.* *per annum* quarterly, or within twenty days, by virtue whereof she entered and became possessed.

* And because 24*ol.* for three years ending at *Michaelmas* * P. 253.
29 Car. 2. and for twenty days after was behind and unpaid, he avows the taking in the messuage *in quo*, &c. as parcel of the tenements demised to the said *Sarah*; *Et cum solutione reddit' prædict' onerat' & obligat'*, &c.

The plaintiff *Gerrit Johnson*, confesses, that *ante prædictum tempus quo*, &c. the said *Sarah Grant* being executrix of the said *Samuel Grant*, father of the said *James*, did give to the said *James* security for payment of 600*l.* given as a legacy as aforesaid. But *Protestando*, that *ante prædictum tempus quo*, &c. he did not surrender the said security, and acquitted her therefrom upon the agreement alledged, nor that the said indentures aforesaid were in prosecution of the said agreement. And for plea saith, That as to 20*s.* *per annum* for the rent of two messuages in *Long-Acre*, parcel of the said rent of 8*ol.* *per annum* for the three years, in the whole amounting to 3*l.* parcel of the said 24*ol.* *Rien Arrear.*

And as to the residue of the 24*ol.* *viz.* 237*l.* *per annum* for the said three years, he says, that before the said demises made, *William* earl of *Craven* was seised of eight of the said ten messuages situate in the *Strand*, in his demesne as of fee, until the said *Samuel Grant*, father of the said *James Grant*, disseised the said earl, and by reason thereof became seised thereof by disseisin, &c.

And so being seised 30 *September* 1655. made his will in writing, and thereby devised the said eight messuages to the said *Sarah Grant* and her heirs, and died 3 *September* 1658. so seised.

That by virtue of the said devise *Sarah* became seised in her demesne as of fee of the said eight messuages, and so being thereof seised, and of the said messuage *in quo*, &c. and also of one other messuage in *Long-Acre*, seised the residue of the said ten messuages by the said indenture first mentioned, demised the said premisses to the said *James Grant* for ninety-nine years, *prout*, and he by the second indenture redemised the same to the said *Sarah* for ninety-eight years *prout*.

That

Term. Hill. 30 & 31 Car. 2. C. B.

That afterwards, & ante prædictum tempus quo, &c. and before any of the three years rent was behind, viz. 27

* P. 254. September 26 Car. 2. the said William earl of Craven * entered upon the said eight messuages, claiming therein his former estate, and did expel the said Sarah therefrom, and hath ever since been seised thereof.

That all the said ten messuages October 1659. and ever since were worth 80*l.* per annum, and no more.

That the said eight messuages then, and ever since have been worth 79*l.* per annum, by reason whereof the said 237*l.* being residue of the said 240*l.* became insolvable to the said James Grant, and still remains insolvable. Et hæc, &c.

Upon this bar the avowant demurs, and the plaintiff hath joined in demurrer.

The sole point remains to be spoke to is, as it is objected by the other side, That the plaintiff in this replevin in his bar to the avowry, hath pleaded as to parcel of the rent, Rien arrear, without making any title to himself.

And whether such his plea be good, is the question?

And I conceive 'tis a good plea.

1. I do agree, that at the common law a stranger could not, nor as yet can plead any thing to the lord's avowry for rent or services, but hors de son Fee, or what doth tantamount.

He cannot plead tenure by less services, Rien arere, or a release, 2 H. 6. 1. a. 22 H. 6. 2 and 3. and 9 Co. 6. 10. a. is against that opinion.

This was grounded upon these reasons and rules of law.

1. *Res inter alios acta alteri nocere non debet.* 'Tis not reason that he who is a stranger shall take upon himself to plead to the title of the tenure, with which he hath nothing to do, in prejudice of the very tenant; and there is a priority between the lord and tenant.

2. In pleading every man ought to plead that which is pertinent for him and his case; and therefore in an assise against a disseisor and tenant, the tenant shall plead a plea which concerns the tenancy, and not the disseisin.

* P. 255. * The incumbent at the common law could not plead to the right of the patronage, wherein he hath nothing, 7 Co. 26 Hall's case, 'till he was enabled by 25 E. 3. cap. 7.

2. But by the statute of 21 H. 8. cap. 19. this strictness is discharged, for as the avowant is not tied to avow upon any

Term. Hill. 30 & 31 Car. 2. C. B.

any person in certain, but upon the land, as within his fee or seignory; so the tenant of the land by the equity of that statute is allowed to plead any plea to save and discharge his goods from the distress, *Legem feras quam ipse tuleris*. So that the law of avowries, and their bars, is much altered from what it was by the common law.

Hob. 108. Brown versus Goldsmith. In replevin, the defendant avows upon *A.* for services of suit of court; the plaintiff pleads in bar, a lease for years from the avowant of the manor; and resolved a good plea, though a stranger.

Br. Tit. Avowry 113. When the lord avows according to the statute, the plaintiff in the replevin may have every plea, that the very tenant might have had though he be a stranger to the lord; and so is *Coke upon Lit. 268. b.* and many books there cited.

3. Though the plaintiff make no title, yet he may plead by this statute, as well as if he did.

Trin. 15 Jac. Moor 883. pl. 1238. Kingswell versus Crawley. In replevin, The defendant avows for rent *eo quod one Dering* held certain lands of him by fealty, and certain rent; that the plaintiff hath the estate of *Dering*. The plaintiff replies, that *Dering* infeoffed one *Wright*, who made a lease for life to the plaintiff, *Absque hoc*, that he had the estate of *Dering*; and ruled by the court, that the traverse was void; for since the statute the party is to avow upon the land, and then 'tis not material what estate the tenant had, if he occupies the land; and so the statute hath changed the law in this point.

*Hob. 108.
Brown versus
Goldsmith.*

Hill. 17 Car. 1. C. B. March 166. Layton versus Grange. In a second deliverance, the defendant makes cognizance as bailiff to *Thomas Marsb*, and sets forth that *Thomas Marsb*, father of the said *Thomas Marsb*, was seised of the manor of *Michael Hall*, of which the land in question is parcel, and the said lands are held by fealty and certain rent, and derives the tenancy to sir *Anthony Cage*, and the seignory to the said *Thomas Marsb* the son; and as bailiff to him makes cognizance for fealty, *ut infra feodum & dominicum sua*. The plaintiff *protestando quod non tenet, pro placito dicit*, that the * defendant took the cattle as in the count, *Absque hoc*, * P. 256. that *Marsb* the father was seised of the services *infra tempus*. The defendant demurs.

By *Banks, Crawley* and *Foster*, resolved that the plea was good, though no title were made by the plaintiff or his master. *Reve* justice wavered in the point, but the others were positive in it; and *Banks* gave the reason, That as at the common law the tenant might plead any plea in bar to an

Term. Hill. 30 & 31 Car. 2. C. B.

an avowry for a rent-charge, as 8 E. 4. 23. *a.* is; so now since this statute, the ter-tenant shall plead any plea to discharge the land from the distress. *2dly*, That as this statute hath been always construed favourably for the benefit of the lord; so it ought to be for the benefit of the tenant. *3dly*, That 'tis no reason that the tenant shall have his goods taken, and not use all ways to redeem them, when not party to the wrongs.

But 'tis objected, That our case is not within this statute; the words whereof are, *Wheresoever any manors, lands, tenements or other hereditaments be holden by any manner of person or persons by rents, customs or services, if the lord of whom any such manors, lands, tenements or hereditaments be so holden, distrain upon the same manors, lands or tenements for any such rents, customs or services, and replewin thereof be sued, that the lord of whom the same lands, tenements or hereditaments be so holden may avow, or his bailiff or servant make comsance, or justify for the taking the said distresses upon the same lands, &c. so holden, as in lands or tenements within his fee or seignior, alledging in the said avowry, &c. the same manors, lands, &c. to be holden of him without naming any person certain to be tenant of the same.* And whether the lessor be a lord within this statute is the question. And I conceive he is lord here within the words and meaning of this statute.

For the Stranger can plead but as the Tenant may do, and if the Tenant for years be not within the statute, this case will be out of it.

Lord is a relative word; and so a mesne is lord in reference to the tenant, and tenant in respect of the lord paramount.

He is lord within the statute of *Marlb' cap. 3.* *Non ideo puniatur Dominus.*

Hill. 5 H. 7. 10. pl. 2. Trespass quare vi & armis clausum suum fregit & averia sua cepit & abduxit. The defendant pleads his frank-tenement, and that he took the cattle damage-feasant. The plaintiff replies, that he had a lease for years from the * defendant, yet continuing, and the defendant demurred; and the question was, Whether this action did lie between the lessor and lessee, notwithstanding the statute of *Marlbr. cap. 3.*

* P. 257.

Resp. It did not lie for so much as the lessor did as lord, as to distrain for his rent, and to demean himself accordingly: but as this case was, he broke his close, which he could not do as lord; and so not within the statute.

The objection was, That he could not be lord, because if the lessee should be distrained by the lord paramount, he could not have a writ of *Mesne*. But answered, that he should have a writ of covenant in lieu thereof. *Mich. 2 H. 6. 1. b.* Thus are the books following. *viz. Mich. 28 E. 3.*

M. 2 H. 6.
1. b.

Term. Hill. 30 & 31 Car. 2. C. B.

97. a. pl. 15. Mich. 38 E. 3. 33. b. Hill. 48. E. 3. 5. b. pl. 10. Co. 2. Inst. 106. 9 Co. 135. b. *Afcough's case*. At the common law there are 4 sorts of avowries. 1. By reason of a tenure, when the lord hath fee in the seigniory, and the tenant hath fee in the tenancy, *ut super verum tenentem suum*. 2. Upon one as his very tenant by the manner, *ut super verum tenentem suum in forma prædicta, viz.* When the tenant makes a lease for life, or a gift in tail, as upon his very tenant by the manner. 3. Upon one as his tenant by the manner, omitting this word (*very*) and that is, when the lord hath a particular estate in the seigniory, as an estate in tail, for life, or less interest, *Super tenentem suum in forma prædicta*. So shall the donor upon the donee, the lessor upon the lessee for life or years. 4. Upon the matter in the land, as within his fee and seigniory; as where the tenant by chivalry makes a lease for life, rendering rent, and dies, his heir within age, the guardian shall so avow upon the lessee, *Super materiam prædictam in terris prædictis ut infra feudum suum*. And by the third way, the lessor did always avow upon the lessee at the common law. Mich. 47. E. 3. fol. ult. pl. 77.

Nota; If the rent of tenant for years be arrear, the lessor cannot avow upon the termor upon the land, but upon the matter, Hill. 5 H. 7. 11. pl. 2. by *Fairfax*, and agreed by all the justices. Tenant for years shall do fealty, and the lessor is *Dominus pro tempore* by reason of the reversion; and an avowry shall be made upon him as upon the matter. And the different way of pleading manifests this; for at the common law, the way is, *Bene advocat captionem averiorum prædictorum in prædicto loco in quo, &c. ut in parcell prædictæ* * *eidem le Plaintiff in forma prædicta dimiss. super tenementa virtute dimissionis prædictæ*. But the avowry upon the statute is in *prædicto loco in quo ut parcellæ mess. præd. cum reddit præd. onerat' & obligat'*, 2 Co. 27. b. *Bettisworth's case*, Int. 594, 595 and 597. And so is *Dyer* 257. pl. 11. where it is said, *Ut in terris districtioni ipsius l'avowant onerat' & obligat'*, is always intended for a rent-charge; but when he avows for a rent, which is due of common right, he ought to avow upon the tenant by the manner.

And so hath the avowant here done.

I will omit to speak of the distress here, by virtue of the contract, admitting it to be out of the statute, and is grounded upon the reservation, as *Foster's case*, 8 Co. 64. As a rent for owelty of partition. A rent confirmed by statute, as *Bellingham's case*.

Resolved.

Term. Pasch. 31 Car. 2. In Scacc.

Resolved. The plaintiff in a replevin may plead nothing in arrear, or any other plea, although he be a stranger and doth not make any title to the land.

* P. 259.

* Term. Pasch. 31 Car. 2.

In the Exchequer.

Hunt *versus* Wotton.

Case.

TRESPASS *vi & armis*. The plaintiff declares, that the defendant the 14th of April 30 Car. 2. did thrust a woman, named *Margaret Hunt*, upon his son *Henry Hunt*, being an infant under the age of discretion, by means whereof his thigh-bone was broke, and the infant was so hurt that it was now despaired of his life, and the plaintiff, was inforced to expend great labour, and divers sums of money to cure him, *ad damnum, &c.* The defendant pleads *Non culp.* and found for the plaintiff, and damages 5*l.*

Sympson serjeant moved in arrest of judgment, because the plaintiff sustained no wrong, for that he was not compelled to expend any money, or to procure his son's cure.

But *Montague*, lord chief baron, *totis viribus contra*.

But to me it seems that the action doth not lie, for that the father cannot have the action, it not being laid *per quod servitium amisit*, nor that the son was less capable of procuring a fortune with a wife, &c. but the child himself ought to have brought the action, and he would have recovered the damages. Authorities in point, 3 Cr. 55. *Gray versus Jeffrys*. In an action upon the case, the plaintiff counts, that he put his son and heir apparent to the defendant to be his apprentice in the art of a tailor for seven years, and that the plaintiff was seised of lands of the yearly value of 20*l.* which were to descend to his said son. That the defendant *vi & armis* did assault the said son, and struck him with a spade upon his back, by which he became lame and decrepit, by reason whereof he lost his marriage, and could not marry him as before, *ad damnum* 200*l.* The defendant demurred; and

Term. Pasch. 31 Car. 2. In Scacc.

and adjudged for the defendant, because trespass for beating or battery of the son lieth not for the father, but the son only shall have the action, and a father shall not have an action for the loss of the marriage of his son and heir, except when a stranger takes him by force and marries him; but if the son marries himself, or a stranger procures him to marry one, the father hath no remedy, *Mich. 1653. Intr. 1653. Rot. 935. Norton versus Jansen, B. R. Stiles 398. Action on the case.* The plaintiff counts that the defendant broke his house and assaulted his daughter against his consent, and begot a bastard child on her, *per quod servitium amisit.* The defendant pleads the statute of 21 Jac. Of *Limitations of Actions.* And upon this a special verdict, that the assault was above four years before, and within six years. And resolved, the father could not maintain an action for the assault of his daughter, but only by reason of the loss of her service. And then damages being given for both, it was not well, and therefore a *Venire Fac. de novo* was awarded; and by the common law the father is not bound to cure his child.

But *Montague*, lord chief baron, and *Atkins* baron, clearly for the plaintiff, and relied upon *Church* and *Church's* case in *B. R. 1656.* Where in *Assumpsit* the plaintiff declared that whereas the plaintiff had at his own charges buried the defendant's child, the defendant promised to pay him his charges; and though there was no request laid, yet judgment was given for the plaintiff, and *Cr. 63. 849. and 881. Rippon versus Norton;* but judgment was afterwards given for the plaintiff.

* P. 260.

It's a rule, that if a statute gives remedy for any thing, it shall be presumed that there was no remedy before at the common law, *Stanf. pl. Car. 2. and the stat. of 43 El. cap. 2. injoins the father to provide for his child, which he was not compellable to do by the common law. Palmer 559. Besfch versus Ceggil.*

Robert Murrey, Gent. *versus* Dorothy Eyton, Flint.
Widow, and Roger Price.

Intr. Hill. 29 & 30 Car. 2.

IN trespass and ejectment of the demise of *William George* Estate.
Richard earl of *Derby* made 2 May 29 Car. 2. of one 2 Jones 237.
messuage, three watergrist mills, ten acres of land, ten Pollexf. 491.
acres of meadow and fifteen acres of pasture in the parish of Skin. 95.
of *Hope* alias *Queenhope*, for five years from the first day of 2 Show. 104.
the said month of May. Upon Not guilty pleaded, the Postea 286,
jury of the county of *Salop* being the next English county 319, 338.
find a special verdict: viz.

That long before the trespass and ejectment king *Richard the third* was seised of the manor of *Hope* in his demesne as of

Term. Pasch. 31 Car. 2. In Scacc.

of fee, in right of his crown, of which the tenements in the declaration are, and time out of mind were parcel. That the said king R. 3. being so seised 17 Sept. 2 R. 3. by
 • P. 261. his * letters patents under his great seal of England then dated, for the consideration therein mentioned, did give and grant the manor and tenements aforesaid with the appurtenances (amongst other things) to sir Thomas Stanley, knight, lord Stanley, and afterwards earl of Derby, sir George Stanley, kn. lord l'Estrange, son and heir apparent of the said Thomas lord Stanley; *Habendum* to them the said Thomas lord Stanley and George lord l'Estrange, and the heirs male of the body of the said Thomas lord Stanley for ever, of the said late king by knights service and rent of 50l. yearly, at *Easter* and *Michaelmas* by equal portions to be paid. The tenor of which said letters patent follows in these words: *viz.*

Letters patent
 of R. 3. 17
 Sept. 2 R. 3.

Richardus Dei gratia Rex Angliæ, Scotiæ & Franciæ & Dominus Hiberniæ, Omnibus ad quos Præsentes Litteræ pervenerint, salutem. Cum non solum Generis Nobilitas sed & Justitiæ æquitas omnes provocent & maximè Reges & Principes homines de se bene meritos præmiis condign. afficere; Sciatis igitur quod ob singulare & fidele servitium quod dilecti nostri Thomas Stanley Miles, Dominus Stanley & Georgius Stanley Miles, Dominus l'Estrange filius dicti Thomæ nobis præantea impender. non solum favend' Jur. & titulo nostro cujus juris & tituli vigore jam nuper ad Coron. hujus Regni nostri Angliæ Dno. adjuvante pervenimus, verum etiam reprimendo proditores & malitias rebel' & proditor. nostr', qui infra idem Regnum nostrum perfidam jamdudum commotion. suscitaverant, ac pro bono & fideli servitio nobis & hæredibus nostris Regibus Angliæ per eosdem Thomam & Georgium & hæred. suos pro defensione nostra & Regni nostri prædict. contra quoscunque prædict. inimicos & rebelles quoties futur. temporibus opus erint impendend. De gratia nostra speciali dedimus & concessimus ac per Præsentes damus & concedimus eisdem Thomæ & Georgio in valor. annuo mille marcarum ultra repris' Castrum, Manerium & Dominium de Hope & Hopedale in March. Walliæ Com. Cestr. adjacen. cum suis membris & pertin. universis Manerium & Villam de Northwich cum pastur. de Overmarsh cum suis pertin. in Com. Cestr. ac Maneria & Dominia de West Lydeford Blakenden Halsbarte als. dict. Halesbear cum suis pertin. in Com. Somerset Manerium sive Dominium de Bereford Sancti Martini cum suis pertin. in Com. Wilts Manerium & Dominium

Term. Pasch. 31 Car. 2. In Scacc.

nium de Ardington cum pertin. in Com. Berks Manerium
& Dominium de Steventon cum membris & pertin' suis in
Com. Bedd. ac Maneria & Dominia de Knotting Collesden
& Catton cum * suis pertin. in dicto Com. Bedd. & omnia * P. 262.
terras & tenementa in Blomeham cum suis pertin. in eodem
Com. Bedd. quæ nup. fuer. Rogeri Tocots Manerium &
Dominium de Gaddesden magn. cum pertin. in Com. Hert-
ford Castrum Manerium Dominium & Socum de Kymbal-
ton cum maneriis de Swinshead Hardwick & Tilbrook &
omnimod. Villis villat. & membris quibuscunque in Com.
Hunt' ad prædict. Dominium de Kymbalton pertin. ac etiam
omnia messuagia terr. & tenementa reddit. & servitium in
Macclesfeild & Christilton cum pertin. in Com. Cestr. quæ
fuer. Henr. nuper Ducis Bucks aut alicujus alterius ad ejus
usum in dicto Com. Cestr. ac manerium de Chorley &
Bolton cum pertin. in Com. Lanc. ac terr' & tenementa in
Brightmead in eodem Com. Necnon totum illud messuag.
ac omnia terras & tenementa cum pertin. quæ fuer. Roberti
Willingby Militis aut alicujus alterius ad ejus usum in Pa-
roch. Sci. Petri juxta Pauls Wharf in Civitate Londin. seu
alibi infra eandem Civitatem unâ cum omnibus Terris Tene-
mentis Messuag. Pratis Pascuis Pasturis Silvis Boscis Aquis
Stagnis Vivar. Molendin. Gardin. Columbar. Reddit. Servit.
Revercon. Cur. Let. Offic. Vic. Franchef. Pleg. Escaet.
Libertat. Jur. Commoditat. quibuscunque necnon feodo
Milit. Advocat. & Patronat. Ecclesiar. Abbat. Priorat. Hof-
pital. Rector. Capell. Cant. & al. Benefic. Escheator, quo-
rumcunque Wardis Maritagiis Scutag. Releviis Hundred
Wapentag. fin. amerciamen. forisfactur. Feriis Mercat.
Chaseis Parcis Warren. Piscar. Wrec. maris Thesaur. invent.
Waif Straif. Catall. Felon. & Fugitivor. Catal. Utlagat.
attinct' convict' & felon. de se Retorn. Brevium & execu-
tion. eorundem necnon omnibus & singulis aliis Libertatibus
Jurisdictionibus Franchef. quietanc. Commoditatibus Emolu-
ment. & liberis consuetudinibus quibuscunque ad prædict.
Castra Dominia Maneria Terras Tenementa & cætera mes-
suagia ac eorum quodlibet de antiquo pertinen. sive spectan.
aut infra eadem Castra Maneria Dominia Terras Tenementa
& cætera Præmissa seu eorum aliquod emergen. contingen.
provenien. seu antea habit' modo quocunque ac adeo plene
& integre sicut aliqua persona vel aliquæ personæ in eisdem
vel eorum aliquo habuer. seu usi fuer. quovismodo ante hæc
tempora. Habend. & tenend. tenementa omnia & singula Habend.
Castra Maneria Dominia Terras Tenementa & cætera
Præmissa cum omnibus & singulis suis pertin. præfat. Tho-
mæ Stanley & Georgio Stanley ac Hæredibus masculis de
corpore

* P. 263

corpore ipsius Thomæ exeun. imperpetuum de nobis & Hæredibus nostris per Servitium militare & reddit. quinquaginta librarum annuatim ad Festa Paschæ & Sancti Michaelis Archangeli per æquales portiones solvend. Concessimus insuper & per Præsentes contedimus eisdem * Thomæ Stanley & Georgio ac hæredibus suis prædict. omnia exit. proficua & revercon. de supradictis Castris Maner. Dominiis Terris Tenementis & cæteris Præmissis cum pertinen. aut de aliqua inde parcell' a Festo Sci' Michaelis Archangeli ult. præterit. provenien. sive crescen. aut nobis quovismodo debet' percipiend. tam per manus Receptor. Ballivor. Firmar. seu al. Occupator. eorundem seu alicujus inde parcel. quam per manus nunc Escaet' & nuper Escaet. separalit. in Com. & locis in quibus hujusmodi Castra Maneria Dominia & cætera Præmissa separaliter existunt. Et volumus & concedimus quod iidem Escaet. & eorum quilibet Escaet. qui impostertum erit de eisdem exit' proficuis & proventionibus erga nos & hæred' nostros quiet' & exoner. existunt per Præsentes. Et si forsan aliquod eorum Castrorum Maneriorum Dominior. Terrarum Tenementorum & cæterorum Præmissorum aut aliquam inde partem versus ipsos Thomam & Georgium aut eorum alterum seu versus Hæred' dicti Thomæ prædict. recuperari sive extra possession. ipsorum Thomæ & Georgii vel eorum alterius aut alicujus Hæred' dicti Thomæ prædict. aliquo debito modo evinci seu ipsos aut eorum aliquem inde legitime expelli contigerit tunc nos & hæred' nii. de al' Castris Maneriis Dominiis Terris Tenementis & Possessionibus infra Regnum nrum. Angliæ ad valor. annum eorundem Castrorum Maneriorum Dominior. Terrar. Tenementor. ac cæterorum Præmissorum recuperat' vel evict' eisdem Thomæ & Georgio & Hæred' ipsius Thomæ prædict' habend recompenfar. faciemus. Et insuper de gratia nra. speciali prædict. damus & concedimus per Præsentes omnia & singula Præmissa præfat' Thomæ & Georgio absque fine seu feodo magno vel parvo nobis sive ad opus nrum. pro eisdem Præmissis vel aliquo Præmissor. reddend. solvend. seu faciend. quovismodo. Eo quod expressa mentio de vero valore vel certitudine Præmissorum seu eorum alicujus seu de aliis donis vel concessionibus eisdem Thomæ & Georgio vel eorum alteri ante hæc tempora fact' in Patentibus minime fact' exist' aut aliquo Statuto Act' Ordinacon. vel Restriction. in contrar. fact' edict' sive ordinat' aut aliqua re causa vel materia quacunque non obstant'. In cujus rei Testimonium, &c.

By

Term. Pasch. 31 Car. 2. In Scacc.

By virtue whereof the said *Thomas* and *George* did enter into the said tenements, and were thereof seised to them and the heirs male of the body of the said *Thomas* earl of *Derby*, and they being so thereof seised, the said *George* lord *l'Es- trange* had issue of his body one *Thomas* his eldest son, afterwards earl of *Derby*: and that afterwards the said • *George* lord *l'Es- trange* died in the life-time of the said earl * P. 264.
his father: and that the said earl, his father, afterwards, viz. 1 Jun. 19 H. 7. died seised of the said tenements in his demesne as of fee-tail, viz. to him and the heirs male of his body; by reason whereof the said tenements in the declaration did descend to the said nephew, the said *Thomas* earl of *Derby*, who entered into the said tenements and became seised thereof in his demesne as of fee-tail according to the limitation in the said letters patent mentioned. And the said *Thomas* earl of *Derby*, being so thereof seised, had issue of his body one *Edward* his eldest son, afterwards earl of *Derby*. That the said *Thomas* earl of *Derby* last mentioned, afterwards, viz. 1 Aug. 13 H. 8. died seised of the said tenements. By reason whereof the said tenements descended to the said *Edward* then earl of *Derby*. That the said *Edward* entered and became seised thereof in tail to him and the heirs male of his body. That the said *Edward* had issue *Henry* afterwards earl of *Derby*. That *Edward* died 24 Octob. 14 Eliz. seised as aforesaid, and that the premisses descended to *Henry*. That the said *Henry* had issue *Ferdinand*, afterwards earl of *Derby*, and *William Stanley*, his second son, afterwards likewise earl of *Derby*. *Henry* 25 Septemb. 35 Eliz. died seised, and the premisses descended to *Ferdinand*, who entered and had no issue male, but only three daughters, viz. *Anne*, *Frances* and *Elizabeth*. That *Ferdinand* 16 Apr. 37 Eliz. died in the life of his brother *William* seised, and so the premisses descended to the said *William*, who entered. That after the death of *Ferdinand*, for determination of suits and controversies between the said earl *William* and *Henry* earl of *Huntington* and *Elizabeth* his wife, one of the daughters of the said *Ferdinand*, *Gray Bridges* lord *Chandos*, and the lady *Anne* his wife, another of the daughters of the said earl *Ferdinand*, and sir *John Egerton*, knight, then son and heir apparent of *Thomas* lord *Ellesmere*, lord chancellor of *England*, and the lady *Frances* his wife, another of the daughters of the said earl *Ferdinand*, 18 Novemb. 4 Jac. an act of parliament was made of and concerning the said suits and controversies, and estate and title of the honours, castles, manors, lands and tenements of the aforesaid earl *Ferdinand*; by which it was enacted as followeth, viz.

Co. 4 Inst.

283.

2 Anderf. 115.

pl. 60.

In

Term. Pasch. 31 Car. 2. In Scacc.

The act of
4 Jac.

* P. 265.

In most humble manner beseeching your royal majesty your highness loyal, faithful and obedient subjects, *William* earl of * *Derby*, of the most noble order of the garter knight, *Henry* earl of *Huntington* and the countess *Elizabeth* his wife, *Gray Bridges*, lord *Chandos* and the lady *Anne* his wife, eldest daughter of *Ferdinando* late earl of *Derby*, sir *John Egerton* knight, son and heir male apparent of the right honourable *Thomas* lord *Ellesmere*, lord chancellor of *England*, and the lady *Frances* his wife; which said *William* earl of *Derby* is brother and heir male, and the said ladies *Anne*, *Frances* and *Elizabeth* are daughters and co-heirs of the said *Ferdinando*, late earl of *Derby*, who died without issue male of his body: That whereas after the death of the earl *Ferdinando* divers variances, suits and controversies did arise and grow between your said subjects *William* earl of *Derby*, and the said ladies, as well touching the estate, right and title of, in and to the honours, castles, manors, lands, tenements and hereditaments of the said earl, as also touching the filial portions and advancements of and for your said subjects, the said ladies *Anne*, *Frances* and *Elizabeth*; for appeasing, ending and determining of which said variances, suits and controversies, the said *William* earl of *Derby* and other issues male of the said honourable house of *Derby*, as also the said ladies before any their intermarriages, by and with the advice and consent of the right honourable *Alice*, countess dowager of *Derby*, late wife of the said *Ferdinando*, and mother of the said ladies; and by and with the advice of other their honourable friends, and of their counsel learned, and officers, did submit themselves to the arbitrement, order and judgment of the right honourable *Thomas* lord *Buckhurst*, lord high treasurer of *England*, and now earl of *Dorset*, and of the right honourable *Gilbert* earl of *Shrewsbury*, the right honourable *George* earl of *Cumberland*, deceased, *George* lord *Hunsden*, deceased, and of the right honourable sir *Robert Cecil* knight, principal secretary to your highness, and now earl of *Salisbury*, being the honourable and well affected friends, as well of the said *William* earl of *Derby*, and other the issues male descended of that honourable house, as of the said ladies heirs general; which said honourable persons are elected to end the said controversies, having deliberately heard the said parties, and their learned counsel and officers, and such other their loving friends as were authorized to deal therein, and having advisedly heard and considered of their several rights, titles and claims, did by the consent and agreement of all the said parties and their counsel, officers and friends,

for

for the appeasing, ending and extinguishment of all variations, claims, titles and * controversies then moved and * grown, and which then after might arise and grow between the said parties or any of them touching the premisses, agree, order and determine (amongst other things) That such and so many of the said castles, manors, lands, tenements and hereditaments, late parcel of the possessions and hereditaments of the said *Ferdinando*, late earl of *Derby*, in the towns, hamlets, villages and places hereafter mentioned, and in every or any of them, should be assigned, conveyed and enjoyed unto and by such person and persons, and of, for and during such estate and estates, and with and under such limitations, powers, liberties, declarations and savings, and in such manner and form as hereafter is mentioned, limited and expressed. With which said order and agreement so made by the honourable persons, as well the said *William*, earl of *Derby*, and the countess *Elizabeth* his wife, and the rest of the issues male descended from that honourable house of *Derby*, as also the said honourable lady *Alice* countess dowager of *Derby*, and the said ladies *Elizabeth*, *Anne* and *Frances*, daughters to the said late earl *Ferdinando* before, and until their several marriages, their said husbands and they did and yet do hold themselves well contented and satisfied.

May it therefore please your most excellent Majesty, that it may be enacted, and be it enacted by your majesty the lords spiritual and temporal, and the commons in this present parliament assembled, and by the authority of the same, That all and every the castles, manors, lands, tenements, possessions, rents, reversions, services and hereditaments with all and singular their appurtenances, late the possession and inheritance of the said *Ferdinando*, late earl of *Derby*, in the towns, hamlets, villages and places hereafter mentioned, and in every or any of them, shall be from henceforth for ever assured and enjoyed unto and by the person and persons hereafter named, of and for such estates and limitations, and with and under such powers, liberties, provisos, exceptions, declarations and savings, and in such manner and form, as hereafter in this present act is mentioned, limited and declared; and that the actual and real possession of all and singular the said castles, manors, lands, tenements, possessions, rents, reversions, services and hereditaments shall be by authority of this present act immediately from henceforth vested, adjudged, deemed and taken to be in the said person and persons hereafter named in possession, remainder and reversion respectively, of, for and

R

during

Term. Pasch. 31 Car. 2. In Scacc.

during such estate and estates, and with and under such powers, liberties, provisoes, exceptions, declarations and
* P. 267. savings, and * in such manner and form, as hereafter in this present act is likewise mentioned, declared, limited and expressed.

And afterwards in the same act of and concerning the manor of *Hope* it was enacted in these words: viz.

That the said *Alice*, countess dowager of *Derby*, during her life, and after her decease, the said *William* earl of *Derby*, during his life, and after his decease *James*, son and heir apparent of the said *William* earl of *Derby*, and the heirs males of his body, and in default of such issue the second, third, fourth, fifth, sixth and seventh sons of the said *William* earl of *Derby*, lawfully begotten, and the heirs male of their and every of their several bodies lawfully begotten, successively and respectively according to the priority of their birth and age one after another; and in default of such issue, sir *Edward Stanley* knight, during his natural life, and after his decease the first, second, third, fourth, fifth, sixth and seventh sons of the said sir *Edward Stanley* lawfully begotten, and the heirs male of their and every of their several bodies lawfully begotten successively and respectively according to the priority of their birth and age one after another; and in default of such issue, *Edward Stanley* of *Bickerstaff* esquire, during his life, and after his decease the first, second, third, fourth, fifth, sixth and seventh sons of the said *Edward Stanley* lawfully begotten, and the heirs male of their and of every of their several bodies lawfully begotten, successively and respectively according to the priority of their birth and age one after another: And in default of such issue *James Stanley*, brother of the last mentioned *Edward*, during his life, and after his decease the first, second, third, fourth, fifth, sixth and seventh sons of the said *James Stanley* lawfully begotten, and the heirs male of their and every of their several bodies lawfully begotten, successively and respectively according to the priority of their birth one after another, shall and may have, hold and peaceably and quietly enjoy all and every the manors, messuages, lands, tenements, rents, reversions, services, hereditaments, liberties, franchises and jurisdictions whatsoever, at any time heretofore the inheritance of the said *Ferdinando*, late earl of *Derby*, in *Hope* and *Hopedale*, and elsewhere within the parish of *Hope* in the said county of *Flint*, to the manor of *Hope* belonging or appertaining. And it was farther enacted, That the said *William* earl of *Derby*, sir *Edward Stanley*, *Edward Stanley* and *James Stanley* successively

Term. Pasch. 31 Car. 2. In Scacc.

successively and respectively in possession to make leases of any of the premisses usually letten, (except the castle of *Haward* and *Greenhalgh*, the mansion-house, parks, demesnes of *Latham*, *Knowsley*, *Newpark*, *Buscough*, *Childwal*, *Pilkington*, * *Hawarden*, *Greenhalgh*, *Broughton* in *Farnes*, * P. 268. *Bothome Armsbead*, *Withersback*, *Ebensham* alias *Ensham* and *Bidston*, the mansion-house, *Channon Row* in *Westminster*, the college-house in *Manchester* and the tower in *Liverpool* - within the several counties of *Lancaster*, *Chester*, *Flint*, *Westmorland*, *Oxon* and *Middlesex* for one and twenty years or under, or for one, two or three lives, or for any number of years determinable upon one, two or three lives in possession, and not in reversion, reserving the old and accustomed rent; and power for them to make jointures not exceeding a third part.

That in the said a^ct there is a proviso in these words:

Provided always, and be it enacted and declared by the authority aforesaid, That your most excellent majesty, your heirs and successors, and all and every other person and persons, bodies politick and corporate, their heirs and successors, executors, administrators and assigns, and every of them, other than the persons to whom any estate or estates are before limited, or mentioned to be limited, by this present a^ct, and their heirs shall have, hold, and enjoy all and every such and the same estate and estates, lease and leases, rights, titles, interests, reversions, rents, annuities, pensions, services, tenures, primer seifins, liveries, actions, statutes, bonds, recognizances, debts, extents, executions, judgments, entries, conditions, covenants, warranties, uses, possessions, offices, commons, liberties, easements, profits, commodities, emoluments, claims and demands, as your highness, your heirs and successors, or any of them, or other person or persons, bodies politick and corporate, their heirs, successors, executors, administrators or assigns, other than the persons before excepted, to whom any estate or estates is before limited by this a^ct, now lawfully have or hereafter shall or may lawfully have, or claim of, into, out of, or for any the said castles, manors, lands, tenements, rents, reversions, services and hereditaments, or of, into, out of, or for any of them in such and the same manner and form to all intents, constructions and purposes, as if this present a^ct had never been had nor made. And your said suppliants, *William* earl of *Derby*, *Henry* earl of *Huntington*, and the lady *Elizabeth* his wife, *Gray* lord *Chandos*, and the lady *Anne* his wife, and sir *John Egerton*, and the lady *Frances* his wife, shall and will according to their most

Term. Pasch. 31 Car. 2. In Scacc.

bounden duties daily pray for your highness long, happy and prosperous reign over us.

* P. 269. That *Alice*, countess of *Derby*, in the act mentioned, was widow and relict of the said *Ferdinand*, earl of *Derby*, and that the said sir *Edward Stanley* knight, at the making of * the said act was a person, who the tenements aforesaid, next after the death of *James* the son of the said earl of *Derby*, without issue male of his body, by the said letters patent ought to take and have according to the limitation in the same letters patent contained.

That the said *Edward Stanley* of *Bickerstaff* in the said act likewise mentioned, until the making of the said act, was the person who ought to take and enjoy the said tenements next after the death of the said sir *Edward Stanley*, without issue male of his body, according to the limitation of the said letters patent; and that the said *James Stanley*, brother of the said *Edward Stanley* of *Bickerstaff*, was the next person who ought to take and have the said tenements next after the death of his said brother *Edward*, without issue male of his body, by the limitation of the said letters patent.

That 1 May 1636. the said *Alice* countess dowager of *Derby* died, that earl *William* entered, and was seised prout *lex postulat*.

29 Sept. 1642. earl *William* died seised, and *James* his son entered and became seised prout *lex postulat*.

The said earl *James* had issue *Charles*, afterwards earl of *Derby*.

15 Oct. 1651. earl *James* died seised, and earl *Charles* entered.

14 February 1653. the said earl *Charles*, and *Dorothea Helena* his wife, by indenture between them of the first part, sir *Charles Woolseley* knight, *Richard Knightley* esquire, *John Twisleton* esquire, *John Hewley* esquire, *Rowland Jenkes jun.* esquire, and *Joshua Sprig* of the second part, and *Thomas Crachley* esquire, *Nicholas Brereton* gent. and *Roger Griffith* gent. of the third part, for 1700*l.* to the said earl, and 1898*l.* 10*s.* to the trustees for selling the said estate by the parliament, paid by the said earl's appointment, grant, alien, bargain, sell, enfeof and confirm to the said *Charles Woolseley*, *Richard Knightley*, *John Twisleton*, *John Hewley*, *Rowland Jenkes* and *Joshua Sprig* their heirs and assigns, the said manor of *Hope*, alias *Queen Hope*; and the said earl *Charles* for him and his heirs, doth warrant the premisses to the said lessees and their heirs, against him and his heirs, and that they shall enjoy the same accordingly.

And

Term. Pasch. 31 Car. 2. In Scacc.

And the said *Charles* earl of *Derby* doth constitute the said *Thomas Crachley*, *Nicholas Brereton*, and *Roger Griffith* his attornies jointly and severally to make livery and seisin of the said premisses.

That livery and seisin was executed accordingly, and the tenants of the said manor did attorn thereto.

* 10 April 1654. That *Charles* earl of *Derby* and his wife levied a fine of the said premisses at the great sessions for the county of *Flint*, with warranty against all men with proclamations. * P. 270.

The said fine was to the use of the said indenture mentioned.

That the grantees entered and continued in possession from the time of the making the said indenture.

That the defendants at the time when, &c. and still are tenants of the premisses to the said grantees.

21 December 1672. earl *Charles* died, leaving issue the lessor of the plaintiff now earl of *Derby*, and was at the death of his father at the age of sixteen years, nine months and four days, and no more.

2 February 29 Car. 2. the lessor of the plaintiff entered, and made the lease to the plaintiff *prout* in the declaration.

They find the statute of 34 H. 8. and conclude generally, If for the plaintiff, for the plaintiff, &c.

Levinz for the plaintiff. It is to be taken notice of, that this act of 4 Jac. in the record doth alter the estate limited by the letters patent; for by the act it is only limited to the seventh son; but by the letters patent to every other son, and then the remainder over to others.

1. 'Tis not doubted but that the reversion still remains in the crown.

2. The possession of the feoffees is nothing to the purpose, for though there be fines levied and descents, yet the statute of limitations hath no operation but from the death of earl *Charles*, which is but about three or four years since. Upon this record are two questions.

1. What effect the fine in 1654. and the feoffment with warranty have, taking the same abstractively from the consideration of the statute of 34 H. 8. cap. 20.

2. What operation the statute of 34 H. 8. hath in this case?

1. As to the feoffment, it is no discontinuance, because the reversion remains in the king. *Lit. sect. 625. and Co. Lit. 335. a.*

2. As to the warranty in the feoffment and fine, it is of no

Term. Pasch. 31 Car. 2. In Scacc.

no effect, because it is a lineal warranty, and so cannot bar without assets.

As to the fine, it is no bar by the statute of 32 H. 8. cap. 36. because the last proviso therein excludes all fines levied of lands intailed, where the reversion is in the king, or intailed by act of parliament.

* P. 271. * But it is objected, that the words at the end of the proviso are, *That every such fine shall be of like force as they were or should have been, if the act had not been made*; and such estates-tail were barrable by fine by the statute of 4 H. 7.

Resp. The statute takes notice that there were diversities of opinion in that point.

Pasch. 19 H. 8. 6. pl. 5. *Dyer* 2. b. pl. 1. and this statute of 32 H. 8. cures a doubt in case of ordinary persons, but leaves out the fines of lands, whose reversion is in the crown. And the exception would not have been inserted, had they not barred before.

If we consider how this point stood before this statute, we shall find, *Br. Fines de terr.* 121. That such fines did not bind the issue, because no discontinuance. *Br. Assurances* 6. accordingly; but *Dyer* 32. a. pl. 1. *Englefield* justice said he knew it by experience, that a fine did bar the issue in tail, though the reversion were in the crown. But *Shelley* justice doubted; and so there was judge against judge. 8 Co. 74. a. Such fine did not bar the issue; and so is 6 Co. 55. in *Chandos's* case *obiter*; and *Co. Lit.* 372. b. A fine is a bar by 32 H. 8. but not by 34 H. 8. and so there are but opinions in this point, and no judgment. This doubt reached the parliament, and therefore they thought that the fine was no bar before 34 H. 8. And the conclusion is, That if it was no bar by 4 H. 7. it was now by 32 H. 8. and then came the statute of 34 H. 8. which made an end of the question; for by the opinion of all it is now no bar.

Then we must consider, whether this act of 4 Jac. alters the use, and here it will be objected,

1. Here is no gift of the king, but of the parliament; for 1. *Alice* is let in before count *William*. 2. Count *William* hath now but an estate for his life, and afterwards to seven of his sons successively; but all the other of his sons are excluded, and sir *Edward Stanley* is let in in their place.

Resp. This is a gift of the king within the intent and meaning of the statute of 34 H. 8. for these reasons.

1. There is no more estate given by this act of 4 Jac. than by the letters patent of 2 R. 3. but all the estates granted
are

Term. Pasch. 31 Car. 2. In Scacc.

are within the compass of the heirs males of the body of *Thomas* first earl of *Derby*.

2. The parliament did not intend to give any thing, but to make firm an agreement between the parties.

* 3. The limitations to earl *William* for life, with the remainder to *James* in tail male is not any bounty, or augmentation of the estate which was given by the letters patent. The act hath taken away from earl *William*, but not added any thing. * P. 272.

4. If earl *William* had had twenty sons, this act doth not exclude them, but others are let in; for the saving extends to them after the determination of the new particular estates, and the old estate-tail supplies the other sons; and the act did not intend to make several donors, viz. The king as to some part, and the act as to other part.

5. The proviso is, saving to the king, his heirs and successors, such, and the same estate, &c. as they now have; and how shall the tenure be saved, if the act must be the donor?

6. This is a case concerning the exposition of an act of parliament, which ought to be as favourably construed as a will.

Now let us examine the objections.

Object. 1. The estate of countess *Alice* is a new estate.

Resp. 1. 'Tis possible she hath but what she had in right of dower.

2. This agreement shall be construed to be pursuant to her dower.

3. But be it what it may be, she is dead, and so is no prejudice.

Object. 2. The estate of count *William* is altered; for now he hath only an estate for life, the remainder to his issues in tail male.

Resp. That is no gift, but a deprivation of a gift. And if a man have three horses in his stable, and a man takes away two of them, he cannot be said to give the third, which he took not away.

Object. 3. Here is a gift to count *James*, for he had nothing before during the life of count *William* his father.

Resp. 1. This act hath not one word of giving in it, but that they shall hold and enjoy.

2. Here the meaning was not to make a gift, but in pursuance of an agreement between the parties to settle the estate; and so it is a distribution of the lands amongst the family.

Term. Pasch. 31 Car. 2. In Scacc.

family. And this act confirms the agreement, as many acts do confirm an agreement of inclosures.

There is no substantial alteration; for tenant in tail by a gift from the crown is restrained from alienation to prejudice his issue.

* P. 273. * *Object.* But tenant in tail, where the reversion is in the crown, may prejudice his issue; as *Co. Litt.* 373. *a. Stratford versus Dover*; as if he be disseised, and the disseisor levy a fine, and five years pass.

Resp. 3 *Cro.* 595. reports this case, and it is judge against judge; and 612. the judgment was given upon point of pleading, and not upon this point. *Moor* 467. *pl.* 665. reporting this case says, that the issue shall be bound.

Object. Count William hath but an estate for his life, for there is power for him to make leases for lives, which needeth not if it had been an estate tail.

Resp. *Abundans cautela non nocet*, as the saving of the reversion to the king, which was by this act taken out of him.

Who is the donor here? for the donee by rules of law ought to hold of the donor by owelty of services, which cannot be here.

Object. Chudleigh's case, The parliament may be the donor.

Resp. It may be so in case of a fee-simple, but not in case of an estate-tail.

The parliament is no corporation, at least not fixt, and therefore cannot be donor.

The earl of *Derby* could not be donor, because he cannot reserve an estate for life to himself, and not part with the reversion; and so I pray judgment for the plaintiff.

Holt for defendant. The only question is, Whether the fine of 1659. bar the estate-tail? or whether the statute of 34 *H.* 8. restrains the same?

The meaning of the statute of 34 *H.* 8. appears by the recital in the preamble, viz. *Whereas the king and his progenitors had granted lands to several persons in tail, to the intent that the recompence for their service should not only be a benefit to their own persons, but a continuing profit to the heirs of their bodies, whereby they should have in special memory the profit they receive by their service, and be thereby encouraged to the like service to their sovereign.*

By which it appears that the lands in question since 4 *Jac.* are now in the same, but this fine bars the estate-tail.

1. This estate is created by 4 *Jac.* and is a new estate, and not such an estate as is within 34 *H.* 8. for that extends

Term. Pasch. 31 Car. 2. In Scacc.

to lands settled, and to be settled by the gift of the crown. And if such a donee of the gift of the crown had before that statute levied a fine, it had barred the issue. This * is not an estate derived out of the crown, nor grounded * P. 274. upon such considerations as are mentioned in the statute.

2. 'Tis not merely a reversion in the crown which makes the estate-tail not to be barred; for if a man purchaseth an estate-tail from the crown, it is not within this statute; but a fine will bar the issues notwithstanding this statute.

3. 'Tis out of the words of the statute in the manner of the creation of the estate; for it is not created by the king, but by the parliament. This act hath always received strict construction, and therefore an estate made by the king, when he was not king, is out of this statute, *Co. Lit.* 372. And an act of parliament is an extraordinary way to settle an estate.

4. From the consideration of this act of 4 Jac. wherein there is a proviso, *That tenant for life shall have power to make leases or jointures*; but no provision for tenant in tail so to do; which shews that the parliament intended, that tenant in tail could do it, as it is limited by this act, which could not be done by 34 H. 8.

Object. This new estate in James is the same estate as by the letters patent.

Resp. It cannot be the same, for it would defeat the whole act.

The act hath made these alterations:

1. The estate for life to Alice, which cannot be dower because not mentioned, and hath a continuance only during the estate-tail.

2. Count William hath an estate for life only, whereas he had before an estate-tail.

3. All the issues of count William would have had an estate by descent, by the letters patent, but now they take by purchase. In a *Formedon* they cannot declare upon the letters patent, but upon this act.

Object. There ought to be donor and donee in every estate-tail.

Resp. An act of parliament may create an estate without a donor.

Object. The saving is to all persons *præter* the person except, &c.

Resp. The eighth son, &c. may be saved within this proviso; but the seven sons are in of another estate.

Object.

Term. Pasch. 31 Car. 2. In Scacc.

* P. 275. * *Object.* Construction of an act of parliament ought to be according to equity.

Resp. This act of 34 H. 8. ought not to be favourably construed, because contrary to equity and reason of the common law, and restrains alienation. *Keilway* 96. a. pl. 6. *Lit. sect.* 360. So the statute of *Westm.* 2. cap. 1. is to be taken strictly for the same reason, *Co.* 2. *Inst.* 335. and therefore it is said, that a fine *ipso jure sit nullus*, yet it is a discontinuance. And so he prayed judgment for the defendant. *Post.*

William Scot *versus* Knapton. *Debt. Error.*

Error.

IN debt upon the statutes of 1 Eliz. cap. 3. and 23 Eliz. cap. 1. for absenting from church for eleven months. Upon *Nil debet* pleaded, judgment was given in B. R. And now the defendant there brought a writ of error. And it was objected by the counsel for the defendant in the writ of error, that such a writ of error did not lie within the statute of 27 Eliz. cap. 8. because it is an action *tam quam*; and the words of the statute are (*other than where the queen shall be party*) and here the king is party. But resolved, the writ doth well lie, because the king is not properly party, though he is to have part of the penalty.

26 Febr. 1678.

Felony.

London. ff. Jur', &c. quod Abrahamus Chiffers nuper de London' labor' quinto die Februarii Anno, &c. tricesimo primo vi & armis, &c. apud London' videlicet in Parochia Sancti Sepulchri in Ward' de Faringdon extra London' præd' duo Collar' ornament' panicilium viril' cum temol' ornat', Anglice vocat' *Mens laced Crevats*, valor septem solidor' de bonis & catallis cujusdam Annæ Charteris Spinster adtunc & ibidem invent' adtunc & ibidem felonice furat' fuit cepit & asportavit contra pacem dicti Domini Regis nunc Coron' & Dignitat' suas, &c.

Upon a special verdi& the jury find, That on the day, and at the place in the indictment mentioned, *Abraham Chiffer* came to the shop of *Anne Charteris* spinster in the said indictment likewise named, and asked for to see two crevats in the indictment mentioned, which she shewed to him, and delivered them into his hands, and thereupon he asked the

* P. 276. price of them, to which * she answered 7s. whereupon the said

Term. Pasch. 31 Car. 2. In Scacc.

said *Abraham Chiffers* offered her 3*s.* and immediately run out of the said shop, and took away the said goods openly in her sight; But whether this be felony, or not, is the question. And if it shall be adjudged felony, we find him guilty; and that the goods were of the value of 7*s.* and that he had no goods or chattels, &c. But if it be not adjudged felony, we find him not guilty, nor that he fled for the same.

And I am of opinion, that this act of *Chiffer* is felony; For that, 1. He shall be said to have taken these goods *fel-leo animo*; for the act subsequent, viz. *His running away with them*, explains his intent precedent; as the suing a *Replevin* to get the horse of another man's, to which he hath no title, is felony, because *in fraudem Legis*, Co. 3 Inst. 108. So if an officer cometh to a man, and telleth him that he is outlawed, when the officer knoweth the contrary to be true, and by colour thereof, takes his goods, it is felony. *Dalton's office of sheriffs*, cap. 121. fol. 489. 1 Sid. 254. Kely 43. And the case of one *Far*, in which I myself was a counsel, was thus; *Far* knowing one *Mrs. Steneer* living in *St. Martin's Lane* in *Middlesex* to have considerable quantity of goods in her house, procured an affidavit to be filed in the Common Pleas, of the due delivery of a declaration, in an action of *Ejectione firmæ*, in which he was lessor, though he had no title, and thereupon got judgment, and took out an *Habere facias possessionem* for the house, directed to the sheriff of *Middlesex*, and procured him to make a warrant to a bailiff to execute the writ, who with *Far* came to the house, turned *Mrs. Steneer* out of possession thereof, and seized upon the goods of a great value, and converted them to his own use, and upon complaint made by *Mrs. Steneer* to sir *Robert Hide*, then lord chief justice of B. R. *Far* was apprehended by his warrant, and indicted at Justice-Hall in the Old Baily, and found guilty, and hanged; for that he used the colour of an action of *ejectionem*, and the process thereupon to execute his felonious intent, in *fraudem Legis*.

2. Although these goods were delivered to *Chiffer* by the owner, yet they were not out of her possession by such delivery, till the property should be altered by the perfection of the contract, which was but inchoated and never perfected between the parties; and when *Chiffer* run away with the goods, it was as if he had taken them up, lying in the shop, and run away with them. *Vide Hill.* 21 H. 7. 14. pl. 21. *Bracton* says, *Furtum est tractatio rei alienæ fraudulenta, * animo furandi, invito illo cujus res illa fuerit.* * P. 277. *Stanford's Pleas of the Crown* 25. a.

Samuel

Samuel Dodd, Clerk, *versus* Ralph Ingleton.

Tithes.
2 Danv. Ab.
596. p. 8.

THE plaintiff being vicar of *Chigwel* in *Essex*, exhibited his English bill in the exchequer chamber against the defendant for small tithes, and amongst the rest for tithe milk; and upon the hearing a question arose, Whether the defendant shall pay the tenth part of the milk of his cows every meal, or only every tenth meal? And it was decreed that he should pay every tenth meal intire to the plaintiff; for otherwise the plaintiff must be forced to keep a servant for that service of collecting the milk only, and perhaps the tithe would not amount to a pint a day. The next question was, Whether *de jure* (there being no custom one way or other) the parishioner ought to send the tithe milk to the vicar to his house, or that the vicar ought to fetch it from the parishioner? And now 22 May 1679. The vicar brought a civilian, one doctor *Raynes*, to argue, whose argument was as follows. By the *Jus commune Ecclesiasticum* which is the canon law, all tithe ought to be brought home to the parson; and the law is grounded upon the scripture. *Malac. 3. 10. Bring ye all the tithes into the store-house*; and *St. Jerome* gives the rule so; and *Linwood l. 3. Tit. 16. De Decimis Cap. Quia quidam, verbo Colligendis*, pag. 168. *Colonus de jure tenetur non solum Decimas hujusmodi colligere & coacervare, sed etiam in horreum Sacerdotis afferre*. And this is certain for predial tithes. And so says *Speculator*, it is for wines. And although there be no express mention of milk, and that milk is here in *England* reckoned amongst minute tithes; yet in other countries it is a predial tithe.

2. All tithes ought to be paid so soon as they may be fit for the parson to receive them; so calves at such an age, and other things, as the matter will bear. Now 'twill be very inconvenient if the milk which *de jure* is tithable every meal, shall be sent for by the parson twice a day, and every time may not be a pint.

3. In the manner of tithing, that which *magis expedit Ecclesiæ*, is to be observed, then it is more decent for the parishioner to bring, than the parson to fetch his tithes. Where the law is silent, the custom of the places adjacent prevails. * Now here, all the neighbour vicars have their milk brought home to them.

* P. 278.

Upon

Term. Pasch. 31 Car. 2. In Scacc.

Upon hearing this argument the court thought fit for the plaintiff, if he saw cause, to insert all his parishioners, or as many of them as he pleased into his bill; and upon their answers the court would deliver their opinion, because of ascertaining the way of paying tithe milk quite through the parish, to prevent multiplication of suits; but if the plaintiff shall not think fit so to do, the court adjourned this cause till *Michaelmas-Term* to give their opinions; and afterwards, viz. 10 November 1679. we all agreed that the tithe milk ought to be carried by the parishioners. My opinion was, That it should be delivered at the vicarage-house, because where there is no custom the common law prevails; but my lord chief baron and the other two barons agreed, that it should be delivered in the church-porch, because the neighbouring parishes did so; but that appeared not in the pleadings, but so it was decreed.

Tender of tithe cheese at the house of the parishioner is good, Rolt. 2 Rep. 328. Palmer 341. Wiseman *versus* Denham. Suggestion, that the parishioner is to pay the tenth quart of milk at the parsonage-house, or at any other place is a good ground for a prohibition, by Popham chief justice, 3 Cro. 609. Austin *versus* Lucas.

John Lisle *versus* John Grey Esquire, Thomas Ogle and Robert Manners. *Ejectment*. Northumberland.

Trin. 22 Car. 2. Rot. 141. B. R. In a Writ of Error in the Exchequer Chamber.

THE plaintiff declares of the demise of William Lisle of four messuages, two hundred acres of land, two hundred acres of meadow, two hundred acres of pasture, and three hundred acres of moor in *Acton* in the parish of Felton. Upon not guilty pleaded, the jury gave a special verdict,

Uses. 2 Lev. 223. Pollexf. 582. 2 Jon. 114. 2 Show. 6. Postea 302, 315.

That before the trespass and ejectment, one John Lisle was seised in fee of the tenements in question; and so being thereof seised 15 August 15 Car. 1. an indenture was made between the said John Lisle of the one part, John Robson and Thomas Lorain of the other part, and inrolled duly within six months in the court of chancery, according to the form of the statute. The tenor whereof followeth in these words, viz.

* This indenture made the fifteenth day of August in the fifteenth year of the reign of our sovereign lord Charles, by the grace of God, king of England, Scotland, France and Ireland, defender of the faith, &c. between John Lisle of Old Felton alias Little Felton in the county of Northumberland,

P. 279.

Term. Pasch. 31 Car. 2. In Scacc.

berland, gent. of the one part, and *John Robson* clerk, one of the prebendaries of the cathedral church of *Durham*, and *Thomas Lorain* of *Kirkharle* in the county of *Northumberland* gent. of the other part, Witnesseeth, that the said *John Lisle* for the settling and establishing of all the messuages, farms, lands, tenements, and all other the hereditaments hereafter mentioned to be, remain and continue in the blood of the said *John Lisle* in such manner and sort as hereafter is herein and hereby limited and expressed, so long as it shall please Almighty God to continue the same; and for and in consideration of the natural love and affection which he beareth unto those, unto whom the estates hereafter are limited; and for the advancement of *Edward Lisle* his son, and others of the blood hereafter-mentioned, He the said *John Lisle* doth hereby, for him and his heirs, covenant, grant and agree to and with the said *John Robson* and *Thomas Lorain* and their heirs, that he the said *John Lisle* and his heirs shall and will from henceforth stand and continue seised of and in all that whole messuage and tenements, called *Felton* alias *Little Felton*, within the parish of *Felton* in the said county of *Northumberland*, late parcel of the possessions of the monastery of *Brentburn* in the said county of *Northumberland*, together with all and singular the appurtenances and premisses to the same belonging, or being accounted, accepted, reputed or taken to be part, parcel or member thereof, or therewith, or heretofore used, occupied, possessed or enjoyed as part, parcel or member thereof; and all that the manor and lordship of *Aeton* alias *Ackton* in the said county of *Northumberland*, commonly called and known by the name of the *North* and *South* parts of the town of *Aeton* aforesaid, together with all and singular tofts, crofts, woods, underwoods, mines, quarries, lands, meadows, feedings, commons and common of pasture; and all and singular the appurtenances whatsoever to the said manor or lordship of *Aeton* alias *Ackton* belonging or appertaining, or therewith used, occupied or enjoyed as part, parcel or member thereof, together with two closes called or known by the names of the *Middle-Wood* closes; and also one messuage late in the tenure or occupation of one *Robert Car*, or his assigns, * with their and every of their appurtenances to the same belonging or in any wise appertaining, or therewith used, occupied or enjoyed as part, parcel or member thereof, with all other the said *John Lisle* his lands, tenements and hereditaments whatsoever, with the appurtenances in the county of *Northumberland* aforesaid, and to and for the uses, intents and purposes hereafter limited, and to and

* P. 280.

Term. Pasch. 31 Car. 2. In Scacc.

and for no other use, intent or purpose whatsoever, that is to say, To and for the use and behoof of the said *John Lisle*, for and during the term of his natural life, without impeachment of and for any manner of waste, and after his decease, to and for the use and behoof of the said *Edward Lisle*, for and during the term of his natural life, and after his decease, to and for the use and behoof of the first son of the said *Edward Lisle* lawfully to be begotten, and to the use and behoof of the heirs males of the body of the first son lawfully to be begotten; and for default of such issue, to the use and behoof of the second son of the said *Edward Lisle* lawfully to be begotten, and the heirs males of the body of the said second son lawfully to be begotten; and for default of such issue, to the use and behoof of the third son of the body of the said *Edward Lisle* lawfully to be begotten, and the heirs males of the body of the said third son lawfully to be begotten; and for default of such issue, to the use and behoof of the fourth son of the body of the said *Edward Lisle* lawfully to be begotten, and the heirs males of the body of the said fourth son lawfully to be begotten; and so severally and respectively to every of the heirs male of the body of the said *Edward Lisle* lawfully to be begotten, and the heirs males of the body of such heirs males lawfully to be begotten, according to their ages and seniorities; and for default of such issue, to the use and behoof of *William Lisle* of *Warkeworth* in the said county of *Northumberland* gent. for and during the term of his natural life, and after his decease, to the use and behoof of the first son of the body of the said *William Lisle* lawfully to be begotten, and the heirs male of the body of the said first son lawfully to be begotten; and for default of such issue, to the use and behoof of the second son of the body of the said *William Lisle* lawfully to be begotten, and the heirs male of the body of the said second son lawfully to be begotten; and for default of such issue, to the use and behoof of the third son of the said *William Lisle* lawfully to be begotten, and the heirs male of the body of the said third son lawfully to be begotten; and for default of such issue, to the use and behoof of the fourth son of the body of the said *William Lisle* lawfully to be begotten, * and the heirs * P. 281.
male of the body of the said fourth son lawfully to be begotten; and so severally and respectively to every of the heirs male of the body of the said *William Lisle* lawfully to be begotten, and the heirs males of the bodies of such heirs males lawfully to be begotten, according to their ages and seniorities; and for default of such issue, to the use and behoof

behoof of the right heirs of the said *Edward Lisle* for ever. *Provided always*, and it is hereby declared by and between all the parties to these presents; And the said *John Lisle* party to these presents, for him and his heirs, doth covenant, grant and agree to and with the said *John Robson* and *Thomas Lorain* and their heirs; That if it shall happen the said *Edward Lisle*, son of the said *John Lisle*, party to these presents, do die without issue male of his body lawfully begotten, that then the said *John Lisle*, party to these presents, and his heirs shall and will stand seised of all and singular the manor, lands, tenements and hereditaments aforesaid, with their and every of their appurtenances, to the use, intent and purpose, that they shall and will raise and levy out of the rents, issues and profits thereof, the several sums of 100*l.* a-piece for each and every of the daughters of the said *Edward Lisle*, to be paid after the same be so levied, to the eldest first, and so in order, according to their several ages and seniorities. *Provided always*, that if the said *John Lisle*, party to these presents, shall and do at any time hereafter during his life-time, declare unto the said *John Robson* and *Thomas Lorain*, or either of them, that he is intended to alter and revoke any use, trust, clause or limitation in or to these presents, by his writing indented by him sealed and delivered in the presence of two or more sufficient witnesses, that then such addition, alteration or revocation by him so made, shall stand and be good and effectual in law to all intents and purposes; any thing herein contained to the contrary in any wise notwithstanding.

By virtue whereof, and of the statute for transferring uses into possession, the said *John Lisle* became seised of the tenements aforesaid in his demesne as of freehold, for term of his life, remainder as is before limited, and so being seised had issue *Edward Lisle* his eldest son.

That the said *John Lisle* 1 March 17 Car. 1. died so seised; after whose death the said *Edward* entered and became thereof seised in his demesne as of freehold, for his life, the remainder as aforesaid, and so being thereof seised, the said *Edward* had issue only a daughter still alive.

* P. 282. * That the said *Edward Lisle* 30 September 1694. made this indenture following in these words:

This indenture made the 30th day of September 1694. between *Edward Lisle* of *Aston* in the county of *Northumberland* gent. of the one part, and *Thomas Forster* of *Etherston* in the said county of *Northumberland*, *John Forster*, second son of sir *Mathew Forster* of *Etherston* aforesaid in the aforesaid county, gent. of the other part, witnesseth, that the

Term. Pasch. 31 Car. 2. In Scacc.

the said *Edward Lisle* for divers especial and good causes and considerations him thereunto moving, Hath given, granted, bargained, sold, aliened, infeoffed and confirmed, and by these presents doth freely and fully give, grant, bargain, sell, alien, infeoff and confirm unto the said *Thomas Forster* and *John Forster*, their heirs and assigns, all that messuage, tenement or farm called and known by the name of *Old Felton*, situate, lying and being in *Little Felton* in the parish of *New Felton* in the said county of *Northumberland*, within the tenure or occupation of the said *Edward Lisle* or his assigns, And all that the town, township or manor of *Ackton* alias *Ackton* with the appurtenances, containing as well all that part of the said manor called the *South Part* of the town, township or manor of *Ackton*, as that part which is called by the *North Part* of the town, township or manor of *Ackton* in the said county of *Northumberland*, and all and singular houses, edifices, buildings, barns, stables, byers, backsidcs, outhouses, gardens, orchards, meadows, feedings, pastures, leafows, commons and common of pasture, woods, underwoods, mines, quarries, easements, profits, commodities and emoluments whatsoever to the said messuage, tenement or farm, and to the said town, township or manor, or either of them belonging or appertaining, or with the same or any part thereof, now or at any time heretofore held, used, occupied and enjoyed as part, parcel or member of the said messuage, tenement or farm, or of the said town, township or manor, or either of them, or of any part of them, or either of them, together with all and singular the writings, charters, evidences, escripts, escrowls, deeds, transcripts of fines, exemplifications of records and muniments whatsoever, of or concerning the aforesaid premisses, or part thereof (amongst other things,) all which said writings, charters, evidences, escripts, escrowls, deeds, transcripts of fines, exemplifications of records and muniments, the said *Edward Lisle* doth for him, his heirs, executors and administrators, covenant, grant and agree to and with the said *Thomas Forster* and * *John Forster*, and their heirs, that he the said *Edward Lisle*, and his heirs, shall and will, at and upon the ensealing and delivery hereof, deliver, or cause to be delivered to the said *Thomas Forster* and *John Forster*, and their heirs, undefaced and uncanceled, to have and hold the said messuage, tenement or farm, &c. unto the said *Thomas Forster* and *John Forster*, their heirs and assigns for ever. And farther, He the said *Edward Lisle* and his heirs, the said messuage, &c. to the said *Thomas Forster* and *John Forster* their heirs and assigns,

S

P. 283.
against

Term. Pasch. 31 Car. 2. In Scacc.

against all persons whatsoever will for ever warrant and defend by these presents.

That the said last mentioned indenture was executed by livery and seisin.

That in *Hillary Term* 1649. A common recovery was suffered of the premises, wherein *Ralph Foster* gent. was demandant, the said *Thomas Foster* and *John Foster* tenants, and the said *Edward Lisle* vouchee, and vouched the common vouchee.

That the said *Edward Lisle* died 1 May 1674. without any issue but his said daughter.

That by and at the death of the said *Edward Lisle*, son of the said *John Lisle*, all the estates and remainders in the indenture aforesaid, bearing date 15 August 15 Car. 1. limited, and which preceded the limitation to *William Lisle*, named in the said indenture and now lessor of the plaintiff, did end and determine.

That the said *William Lisle* was cousin of the whole blood of the said *John Lisle*.

That the said *William Lisle* after the death of the said *Edward Lisle*, 20 January 28 Car. 2. did enter upon the possession of the said *John Grey*, *Thomas Ogle* and *Robert Manners*, and became seised *prout lex postulat*, and made the lease to the plaintiff, who entered, and was possessed until the defendants ejected him: And if for the plaintiff, for the plaintiff, &c.

Judgment was given in *B. R.* for the plaintiff; and now the defendant brings a writ of error.

Pollexfen for the plaintiff in the writ of error.

The questions are two, 1. Whether by the conveyance of 15 August 15 Car. 1. *Edward Lisle* have an estate-tail?

2. If he hath not, then whether the plaintiff hath any title considering the proviso?

* P. 284. * *As to the first*, The case is no more but this.

Land is limited to the use of Edward Lisle for his life, the remainder to his first, second, third and fourth sons successively, and the heirs male of their respective bodies; and so severally and respectively to every of the heirs male of the body of the said Edward, and the heirs male of the body of such heirs male, according to their ages and seniorities, the remainder to William Lisle, &c. Edward suffers a recovery, and dies without issue male.

And I conceive that *Edward* had an estate-tail, and so the recovery well suffered to the use of the *Fosteres* and their heirs.

It is agreed on all hands, that where an estate is limited

Term. Pasch. 31 Car. 2. In Scacc.

to a man for life, and afterwards to the heirs of his body; the heirs are in by descent and not by purchase, *Co. upon Lit.* 22. b. 1 Co. 104. a. 11 Co. 79. b. *Lewis Bowle's case*, which is in effect the same with this in question.

Object. Here it is to the heirs male of the body of *Edward*, and the heirs male of the body of such heir male.

Resp. The addition of those words make no alteration, but are only words of abundance, and are comprehended within the first words, and are of the same nature; and so is *Shellie's case*.

'Tis not like to *Archer's case*, for there the limitation is to the heir in the singular number.

Object. The words are relative, and so severally and respectively to every of the heirs male of the body of *Edward*.

Resp. We are upon the construction of a deed, and not of a will, and therefore rules in limitation of estates ought to be here observed.

The word (*heirs*) is a term of art in the law, and hath an established sense; and *Littleton* says, it is the sole word which passeth an inheritance.

There are certain words which in the law are appropriate to some particular purpose, *Coke upon Littleton* 9. a. And this word (*heirs*) is so appropriate to an estate of inheritance, 1 Co. 103. b. *Shellie's case*. From which we may infer, that we cannot alter the legal signification of the word (*heirs*) and construe it to signify sons or issue.

Object. This is a conveyance by way of use, which may be construed with equal favour as a will.

Resp. Uses are now reduced to the rules of the common law. 1 Co. 87. b. *Corbet's case*. *Winch.* 60. 1 *Roll. Abr.* 837. R. pl. 1. and 2. *Tit. Estate*. A feoffment to the use of *A.* and his issues male of his body, makes not an estate-tail, for want of the word *heirs*.

* And there is no case to be found in law, where the word (*heirs*) is taken for issue or son; And in this case should heir be taken for issue or son, here would be a very great alteration in point of limitation, for the fifth son must take by name of son.

1. The word (*so*) alters not the case; and if the interpretation of a deed should be as of a will, many suits would be upheld by reason of the incertainty of the law in such cases.

2. The operation of the proviso is out of doors, because it is found in the verdict, that all the estates precedent to the estate of *William Lisle* are determined.

§ E. 4. 7. When
uses have
gained the re-
putation of in-
heritances de-
scendible, the
common law
directs the de-
scendant of them,
4 Co. 22. a.
* P. 285.

Term. Trin. 31 Car. 2. In Scacc.

Levinz for the defendant in the writ of error. *Edward* hath but an estate for life, because, 1. 'Tis a conveyance by way of use which was originally but a trust, and an equitable thing, and therefore ought to be favourably construed.

2. The intent of the father was plainly contrary; for why should he limit no farther than to his fourth son? and it was not intended that *Edward* should have any other estate but for life in possession, because power is provided for him to raise portions for his daughters, which need not have been if he have an estate-tail, for he could do it by a common recovery.

3. 'Tis not a limitation to the heirs male only, but to every of them, according to their seniority.

4. 'Tis to the heirs male of those heirs male. And so prays judgment for the defendant. *Adjournatur. Post.*

* P. 286. * Term. Trin. 31 Car. 2. 1679.

Murrey versus Eyton. Antea 260.

Estate.

2 Jon. 237.

Pollexf. 491.

Skin. 94.

2 Show. 104.

Postea 319,

338.

POLLEXFEN for the plaintiff. The estates limited by the act of 4 Jac. are the same estates in substance with what were limited by the letters patent, and vary only in circumstances, and therefore *Ferdinando* was seised in tail under the patent, and *Alice* intitled to dower under him.

The first alteration objected is the limitation to *Alice* for her life,

Resp. That may consist with the estate in the patent, for it is but for her life, and it is but a third part, which is equivalent to the dower she should have by the estate in the patent.

The second alteration is, that count *William* hath an estate-tail by the patent, but now by the act he hath but an estate for life, with remainders to his sons in tail.

Resp. By the first estate he had no other advantage than he

Term. Trin. 31 Car. 2. In Scacc.

he hath by the estate for life, and therefore there is no substantial alteration.

The third alteration is, that here are by the act limitations to other persons, viz. *Edward Stanley, &c.*

Resp. Those other persons were to have succeeded by the patent.

Object. The proviso to make leases and jointures.

Resp. As to the power to make leases, tenant in tail could have made such leases before. And as to the power to make jointures, it is to be only of the third part of what he shall be in possession, and so is no more than dower.

Object. *Coke on Litt.* 372. b. A recovery suffered by tenant in tail, where the reversion was in the crown, barred the estate-tail before the statute of 34 H. 8. cap. 20. and so it was agreed in 33 H. 8. as it is *Br. tit. Tail* 41. 40 Aff. pl. 36.

Resp. The lord *Brook*, who was made chief justice 2 Mar. and was either a judge, or very near it, and at the height of his practice in 38 H. 8. about which time the case is cited * by the lord *Coke*, is of another opinion. *Br.* * P. 287. *Affurances* 6. *Fines levie de terres* 121. and he lived nearer the making the statutes of 32 H. 8. and 34 H. 8. So is *r Anders.* 46. pl. 118. And by the penning of the statute of 34 H. 8. it appears that no notice is taken therein of any fine, but only of a recovery, which shews that a fine extends not to an estate-tail where the reversion is in the king.

Serjeant *Weston* for the defendant. The estate is totally altered by the act of parliament, for now the estate created by that act is drawn out of the estate-tail which was created by the letters patent, and not out of the reversion in the crown, and count *William* had a reversion in him expectant upon this new estate. And an estate-tail is capable to have another estate drawn out of it, either by wrong or by right, which may out-last the old estate. Tenant in tail bargains and sells; it is a good estate to last till the issue enters. And whatsoever thing may be done where the reversion is in a common person, the same thing may be done by act of parliament in case of a king.

Object. If here be a new estate, who is the donor? Not the act of parliament, because a parliament is no corporation, and so cannot be said to be donor.

Resp. An act of parliament may be donor by way of giving a penal judgment, as in case of forfeitures. 2. By way of execution of an agreement, and either the act is donor, and

Term. Trin. 31 Car. 2. In Scacc.

and tenant in tail is donor proportionably, as in the statute of uses; and here *William* is the donor.

Object. The old and new estate came both into one person, viz. count *Charles*, and so he could not alien the one without the other.

Resp. It is all one as if the estates had been in divers persons, and *Charles* here had power over the new estate-tail by fine, feoffment, &c. but not over the old estate-tail.

Object. This is *Petitio Principii*, for whether he hath any power over either of the estates is the question.

Resp. The estate granted by *Charles* shall arise out of the estate which is most mediate to the gift, viz. the estate-tail, and not out of the reversion in the crown which is the old reversion.

The statute of 34 H. 8. being discharged by the act of 4 Jac. the lands became alienable at all times afterwards, as *Dumport's* case, where a condition which restrains alienation is once dispensed with, is for ever after destroyed.

* P. 288. * 14 Car. 2. *Gardiner's* case, upon a special verdict, king H. 8. gives to *Michael Stanhope* and his wife, and the heirs of their bodies, certain lands, *Michael* dies, the lands descend to *Thomas Stanhope*, his son and heir, who petitions the queen to grant the reversion to some persons in fee, to the intent the said *Thomas Stanhope* may make a lease for 99 years by way of mortgage, and enters into a recognizance to the queen, conditioned that nothing shall be done whilst the reversion is out of the crown, prejudicial to the queen; the queen conveys the reversion to the lord *Burleigh* and sir *Walter Mildmay* in fee. *Thomas Stanhope* makes the lease, then suffers a common recovery; the said lord *Burleigh* and *Walter Mildmay* reconvey to the queen. The questions were 1. If the grant to the lord *Burleigh* and sir *Walter Mildmay* was void, for the queen was deceived in her grant; and resolved the grant was good, and the queen not deceived. 2. Whether the queen being in by the re-grant, sir *Stanhope*, the son of *Thomas*, was now restrained from aliening: And resolved he was not, because the force of the statute of 34 H. 8. was discharged. *Et adjournatur. Post.*

Player

Term. Trin. 31 Car. 2. In Scacc.

Player *versus* Vere.

THE defendant being sued in London brings an *Habeas Corpus* directed to the mayor, aldermen and citizens of the said city, who make this return, *viz.*

By law.
1 Danv. Ab.
734. p. 5.
Antiqua Ci-
vitas.
1 Vent. 21.
1 Sid. 284.
2 Keb. 27.
490, 501.
Postea 324.

The city of *London* is, and hath been time out of mind an ancient city, and that the mayor and commonalty and citizens of the said city are, and time out of mind have been a body politick and corporate, and time out of mind have been known by the name of the citizens of the city of *London*, barons of the, &c.

And that in the same city there is, and time out of mind hath been a custom used and approved of, *viz.*

That the mayor and commonalty and citizens of the city of *London* by themselves and such other person or persons, as by the mayor and aldermen of the city of *London* afore-said for the time being, by the assent of the commons of the same city have been appointed, have and have had right to order and dispose of carrs, carts, carrooms, carters and carmen, and of all other person and persons whatsoever working any carrs or carts within the city of *London* and liberties thereof according to the custom there.

Custom to or-
der carts.

* And that there is, and hath been time out of mind a custom, that if any custom be defective, or that there shall be any thing in the city of new-emerging, where before there was no remedy, the mayor and aldermen with the assent of the commonalty may appoint, and have appointed and ordained fit and convenient remedy and agreeable to reason for the profit of the citizens of the same city and other the subjects of the king thither resorting, when and as often as they should think fit, so as such ordinance were profitable for the king and his people, & *bonæ fidei consen* and reasonable.

* P. 289.
Custom to al-
ter and amend
a by-law.

That the said customs are confirmed by parliament in the seventh year of king R. 2.

That in a common council held 2 April 1677. It was enacted, as followeth.

For the better and more regular ordering and disposing of all carrs, carts, carrooms, carters and carmen, and all other persons whatsoever that shall hereafter work any carr or carts within this city or the liberties thereof for hire, Be it enacted and ordained by the right honourable the lord mayor, aldermen and commons in common council assembled, and by

Act of com-
mon council.

Term. Trin. 31 Car. 2. In Scacc.

Repeal of a
former by-
law.

Christ's Hospi-
tal to have the
ordering of
cars.

* P. 290.

by the authority of the same, That one act of common council made in the mayoralty of sir *John Lawrence* knight, for the government of carrs, carts, carrooms, carters and carmen, And every clause, article and thing therein contained, be from henceforth repealed; And the same is hereby repealed and made void to all intents and purposes. And be it farther enacted and declared by the authority aforesaid, that the president and governors of *Christ's Hospital* shall have the rule, oversight and government of all such carrs, carts, carters and carmen, and of all other persons whatsoever, that do or shall hereafter work or use any carrs or carts within the city of *London*, or the liberties thereof, for hire, according to the rules, directions and provisions in this present act mentioned and comprised. And the present trade of this city being seriously considered, and to the end that all the streets and lanes of this city may not be pestered with carrs or carts, and his majesty's liege people may have free passage by coach or otherwise through the said streets and lanes: Be it enacted, That no more than 420 carts shall be allowed or permitted to work for hire from one place to another within this city or the liberties thereof, and that each of them shall be made known by having the city arms upon the shaft of every such cart, in a piece of brass, with the number upon it, and that 17s. 4d. per annum * and no more shall be received and paid for a carroom, and 20s. and no more, or greater fine, upon any admittance or alienation of a carroom, which 17s. 4d. per annum, and 20s. aforesaid, is to be wholly applied towards the relief and maintenance of the poor orphans harboured and to be harboured in the said *Christ's Hospital*. And that if any person or persons shall presume to work any carrs or carts within the said city and liberties for hire by himself or servant, not being duly allowed as aforesaid, such person or persons for every time so offending shall forfeit and pay the sum of 13s. 4d. to be recovered, received or obtained as is hereafter mentioned.

And be it farther enacted by the authority aforesaid, That there shall not be hereafter any car, cart or cars permitted or allowed, to any wharf, wharfingers, woodmongers or retailers in fuel, or kept or worked by any wharfinger or any retailer or retailers in fuel after the 24th day of *June* next. But such car, cart or cars as are part of the said number of 420 cars licensed by the said president and governors which are allowed the carriage of all wood, coals and other fuel within the same city and liberties thereof at such rates, and in all other respects, as other goods and

Term. Trin. 31 Car. 2. In Scacc.

and commodities are used to be carried, and not otherwise. And if any wharfinger, woodmonger or other retailer in fuel, shall presume to keep and work any cart or car contrary to the true meaning hereof, such person and persons for every time so offending shall forfeit and pay for the first offence the sum of 13s. 4d. to be recovered and obtained as is hereafter mentioned, and for the second and every other offence afterwards, double the said sum of 13s. 4d. to be also levied as is hereafter expressed.

Provided nevertheless, That it shall and may be lawful for every person and persons with his and their own, or with any other car, cart or cars, to bring out of the country to the said city, or to fetch from the said city into the country any coals, fuel or other goods, wares and merchandizes. And that it shall be lawful for every retailer of fuel to bring home to his or their own houses or wharfs all manner of fuel by and with his and their own, or with any other car, carts or cars.

And be it farther enacted, That such as have any car-room or carrooms duly licensed and allowed as aforesaid, shall not directly nor indirectly let them out for hire to be worked by any others at any time hereafter without the approbation and allowance of the said president and governors of *Christ's Hospital* * for the time being first obtained, and attested in writing under the said president's hand; To the end that none may be admitted to work any car, but such as should be found of civil carriage and able, and meet for that employment, upon pain that every person so offending therein shall forfeit the sum of 10s. a day for every day he shall let to hire the said car, to be recovered as is hereafter mentioned; And that the prices of carriage may be made moderate as well for the people as the carmen, It is enacted, That forthwith this present year and hereafter always from time to time, as often as occasion shall require, reasonable rates and prices of carriages within this city and liberties shall be set and appointed by the court of aldermen, they calling to their assistance such of the commons as they shall think fit for their information therein. And the said prices to be printed and set upon posts in publick places, and a copy thereof to be always carried about by every respective carman for the satisfaction of all persons that shall desire to see the same. And if any carman shall demand and take more than according to such rates and prices so to be set down, such person and persons so offending shall forfeit and pay for every such offence the sum of 10s. to be had and recovered as is hereafter mentioned. It is hereby farther

* P. 291.

farther enacted, That if any person or persons authorized to work any car or cars by himself or servant shall neglect or refuse duly to pay the said yearly rent of 17s. 4d. a year to the said president and governors, for the uses aforesaid for every the said car and cars, as is before mentioned, the carroom that is the licence of such person or persons to work such car or cars be suspended, and such person or persons be disabled to work any longer by virtue of the same licence, until he or they shall conform to the payment of the said duty of 17s. 4d. respectively. And if any person or persons, for the cause before mentioned being so disabled, shall presume before conformity after such disallowance to use or work any car or cars either by him or themselves, or by his or their servant or servants, agent or agents, then every such person and persons shall respectively forfeit and lose the sum of 13s. 4d. for every time they shall so work, to be recovered and applied as is hereafter mentioned.

And lastly it is enacted, That all penalties, pains and forfeitures in and by this act before limited and appointed, shall and may be levied by distress of the goods of the person so offending in the said city to be found or recovered by action of debt, bill or information in the name of the chamberlain of this city for the time being, in his majesty's
 * P. 292. court holden before * the lord mayor and aldermen of the said city in the chamber of the *Guildhall* of the city of *London*, and after recovery thereof, one moiety after charges deducted shall be to the informer, and the other moiety to the poor of *Christ's Hospital* in *London*, to be employed for and towards their relief. In all which suits to be brought by this act, the chamberlain shall, in case he do recover, be allowed his ordinary costs and charges to be expended in and for recovery of all such forfeitures against the offender and offenders. And in case upon a trial the verdict shall pass for the defendant, or in case the party shall be nonsuit or discontinue his suit, in every such case the defendant shall also recover his reasonable costs.

Provided always, and be it enacted by the authority aforesaid, That no person or persons hereafter to be employed in taking care for the putting of this act in execution, as a streetman or other officer, shall be allowed to have any carroom within the city of *London* or the liberties thereof; any thing in this act, or any other law, usage or custom of this city, to the contrary in any wise notwithstanding.

They farther certify, That before the coming of the writ of *Habeas Corpus*, the defendant was taken in the said city,

Term. Trin. 31 Car. 2. In Scacc.

city, and imprisoned in the custody of the sheriffs thereof by virtue of an original bill of debt upon demand of 13s. 4d. against him 2 Novemb. 29 Car. 2. upon the said act before the mayor and aldermen in the chamber of the *Guildhall* of the said city, according to the custom of the said city, which said original bill doth still there depend undetermined.

Thompson for the defendant. That here ought no *Procedendo* to be granted, but that the defendant may be discharged from the action. This writ is a *Habeas Corpus* to remove a cause out of an inferior court, and if it appears that the plaintiff hath not cause of action, or that this court hath jurisdiction of the cause, no *Procedendo* ought to be granted.

I hold, 1. This by-law is unreasonable and void, and not warrantable by the custom.

2. The defendant is not within the penalty of it.

3. This court is well possessed of the cause.

As to the first, By this custom alledged, the mayor and aldermen have no power to restrain the number of carts, or to impose fines.

All by-laws to restrain liberty or trade are void. 11 Co. 53.

The taylor's of *Ipswich* case, *Moor* 576. pl. 796. *Dave-
nant* versus *Hardies*, 1 *Roll. Abr.* 364. A. pl. 6.

* *M.* 29 *Eliz.* B. R. A by-law in *London*, That none * P. 293.
should sell sand which was not taken out of the *Thames*, resolved void. And there was a by-law 42 *Eliz.* to this very purpose adjudged void, save only that here men may carry their own goods. 1 *Roll. Abr.* 364. pl. 5. *Pain* versus *Haughton*, and 24 *Car. 2.* B. R. *Player* versus *Bradnox*. This custom was returned upon a *Habeas Corpus*, and no *Procedendo* allowed.

This by-law hinders the woodmonger from following their trades; for they must use one of the 420 cars; and by the same reason that they may appoint 420. they may appoint but 20. or more or less, and may impose what fine they please, and what rent, &c. They may as well restrain brewers, tallow-chandlers, hackney-coachmen.

Object. Respect ought to be had to the city of *London*.

Resp. 'Tis true, but they are not to make by-laws prejudicial to the people.

As to the 2d, Admitting this by-law to be good, yet this defendant is not within the penalty thereof, for that it binds none but freemen, citizens and inhabitants, and it doth not appear that he is a freeman, citizen or inhabitant. 1 *Bulst.* 11. *Franklin* versus *Green*. In the case of the butchers. The plaintiff hath not set forth the custom, but declares upon the by-law as upon an act of parliament. *As*

As to the 3d, This court is possessed of the cause. There is a difference where a *Habeas Corpus* is to remove a cause grounded upon a custom which cannot be taken notice of in this court, as for calling a woman whore, &c. and where this court hath cognizance, as in this case; for an action of debt will lie here upon a by-law made in any place.

Object. This action is for a duty under 40s. and so not suable here by the statute of *Gloucester cap. 8*.

Resp. That statute extends not to this court, for the words of the writ upon the statute are, That Pleas *vi & armis* cannot be sued in *minori Curia quam coram nobis vel alibi coram Justiciariis nostris ad mandatum nostrum*, &c. *Regist. Orig. III. b. F. N. B. 46, & 47.* and so the court of exchequer is excluded.

Sir George Geoffreys recorder of *London contra*. He first answers the objections made to the return.

1. *Object.* That it is not alledged, that the defendant is a citizen, freeman or inhabitant.

Resp. This objection was made to the return of the by-law concerning the *Eastland* company, and ruled that 'twas well enough.

* P. 294.

* 2. As to the setting forth of the custom in the declaration, it need not, because the citizens are bound to take notice thereof.

3. This court is not possessed of the cause, because this duty is to be sued for in *Guildhall*, and not here or elsewhere.

Though the by-law may be nought for the fine, it may be good for the rent; for a by-law may be good for one part and bad for another. As to the number, if they cannot be restrained, the streets would be pestered. And by-laws of the like nature in *London* have been here or in the other courts allowed, as, *That none but freemen shall exercise a trade in any shop*, and so is such a by-law good in any petty corporation, 8 Co. 121. *Wagoner's case*. And it shall not be presumed that the magistrates will do wrong. *Regist. 105.* The custom of *Rippon*, *That none should exercise the trade of a dyer without the licence of the archbishop of York, lord of the said town.* 34 H. 6. *Andrew Devene* was committed for exercising the trade of a common broker, not being licensed and sworn; he brought an *Habeas Corpus*, and was remanded to *London*; the archbishop of *Canterbury* was then chancellor, and adjudged it to be a good by-law.

Lib. Dunthorn fol. 237. in *Guildhall*, a book which is a repertory of the records in *Guildhall*. There is the by-law for the brokers, and they pay 40s. annually at this day, and ever since they have been licensed.

Term. Trin. 31 Car. 2. In Scacc.

H. 14 & 15 Car. 2. C. B. Debt by the chamberlain against one *Hutchins* upon this by-law, and there were two justices against two, but afterwards a *Procedendo* was granted, and the lord chief justice took notice in that case of one *Barker's* case, 8 Car. 1. for licensing porters.

Object. 1 Roll. Abr. 364. *Pain* versus *Haughton*.

Resp. That case is not so strong as this, because it was in an action of trespass, and so more strict than upon a return, and there was a particular advantage to particular persons.

Mich. 1656. in C. B. *Osburn's* case, after many arguments difference was agreed between by-laws made by virtue of a custom, and where they are made by virtue of a charter; and here this by-law is founded upon custom, and a *Procedendo* was there granted, and so is 2 Cro. 597. *Broad's* case, custom is stronger than a charter. *Moor* 403. A by-law to restrain the liberty of hawkers in London good for that reason.

An act of common council may be good in part, and void in part. *Adjournatur. Post.*

* *Jeremy Guy* versus *William Dormer*.

* P. 295.

Hill. 29 Car. 2. *Warr.*

TRESPASS and ejectment of a demise of *Robert Dormer* made 1 Septemb. 29 Car. 2. by indenture, of five messuages, 300 acres of land, 100 acres of meadow, and 400 acres of pasture with the appurtenances in *Granborough*, *Woolescot*, *Walcot* and *Willowby*, and of all tithes of grain and hay arising by the premises from the last of August then last past seven years. Upon Not guilty pleaded, the jury find a special verdict, viz. Revocation.

That one *William Dormer* esquire was seised of the lands and tenements in the declaration mentioned in his demise as of fee: And so being seised, the said *William* 25 and 26 Septemb. 7 Car. 2. by his indentures of lease and release conveyed the same to *William Moor* and *John Carter*, and their heirs, to the uses in the same mentioned.

The tenor of which indenture of release followeth in these words:

This indenture made the 26th day of September in the year of our Lord 1655. Between *William Dormer* of *Templeton* in the county of *Berks* esquire of the one part, and
William

Term. Trin. 31 Car. 2. In Scacc.

William Moor of the *Middle-Temple London* Esquire, and *John Carter*, second son of *Ancel Carter*, citizen and grocer of *London*, of the other part. Whereas the said *William Dormer* by his indenture bearing date the day before the date of these presents made between the said *William Dormer* of the one part, and the said *William Moor* and *John Carter* of the other part, hath for the consideration therein mentioned granted, bargained and sold unto the said *William Moor* and *John Carter* all those several and inclosed arable meadow and pasture grounds, lying and being in the parish, lordship, hamlets or precincts of *Granburrough*, *Woolestot* and *Walcot* in the county of *Warwick*, and hereafter particularly mentioned, that is to say, All that several and inclosed pasture or pasture ground called or known by the name of *Braddimer's Close*, abutting upon *Willoughby* field, and also all that several and inclosed pasture or pasture ground called or known by the name of *Turnchil*, which two closes are containing by estimation 165 acres, be they more or less, * whereof forty of the said acres are or were in the possession of *John Frandon*, and also all that one other several and inclosed pasture or pasture ground wherein the shepherd's house now standeth, adjoining to the said ground called *Swinehill*, being divided with an hedge called *Course Hadens Hedge*, containing by estimation 128 acres, be it more or less; Also one other close adjoining to the said last mentioned pasture, and adjoining also to *Dunchurch* field, containing by estimation 26 acres and two rods, be it more or less; And also three other several and other inclosed closes or pasture grounds, lying betwixt *Onely* grounds, the *Grange* and *London* highway, containing by estimation 135 acres, be the same more or less; And also all hedges, ditches, fences, mounds, freeboards, ways, passages, privileges, profits, commodities, emoluments and hereditaments whatsoever to the said several and inclosed arable meadow and pasture grounds, and to other the before mentioned premisses, or to any of them belonging, or in any wise appertaining, or to or with them, or any of them, with their and every of their appurtenances, and the reversion and reversions, remainder and remainders of all and singular the before mentioned bargained premisses, and of every part and parcel of them, and every of them, and all rents and services reserved upon any demise, lease or grant, demises, leases or grants heretofore made of the same bargained premisses, or of any of them, or of any part or parcel of them, or of any of them; And also all the estate, right, title, interest, claim and demand whatsoever of him the said *William Dormer*, of,

* P. 296.

in

Term. Trin. 31 Car. 2. In Scacc.

in or to the before mentioned granted premisses, or of, in or to every or any part or parcel of them, or any of them; And all and all manner of profits and commodities whatsoever coming, growing, arising or renewing, or to be had in, of, upon or forth of the high meadow and *Asbil* in *Woolefcot*, *Walcot* and *Willowby* in the said county of *Warwick*, *Mickmeadow* and the common greens and the lands leading to and from the said greens in *Woolefcot* and *Walcot* aforesaid, and of, in, upon and forth of all and every the lands, tenements, meadows and hereditaments of him the said *William Dormer*, lying and being in the common fields of *Willowby* aforesaid, and of, in, upon or forth of all, every or any part or parcel thereof, the house or homestall now or lately in the occupation of *John Frandon* being in *Woolefcot* aforesaid only exoepted and foreprized; To have and to hold the same unto the said *William Moor* and *John Carter*, their executors or assigns, for the term of one year from the day before the said * recited indenture next ensuing, and fully to be compleat and ended, as by the said recited indenture it doth and may appear; by force whereof the said *William Moor* and *John Carter* are actually possessed of the premisses. Now this indenture witnesseth, That the said *William Dormer*, for conveying and assuring the several pasture grounds and meadows, lands, tenements, hereditaments and premisses hereafter mentioned and declared, and for the good love and affection he hath and beareth to *Frances* his wife, and for her better maintenance and sustentation, and for the natural love and affection, which he beareth unto *Robert Dormer*, nephew of the said *William Dormer*, and for divers other good causes and considerations him the said *William Dormer* in this behalf especially moving, hath granted, released and confirmed, And by these presents doth grant, release and confirm unto the said *William Moor* and *John Carter*, their heirs and assigns, all and singular the said several inclosed pastures and pasture grounds, meadows, lands, tenements, hereditaments and premisses bargained and sold, or mentioned, meant or intended to be bargained and sold, in and by the said recited indenture, and every part and parcel thereof, with their and every of their rights, members and appurtenances whatsoever, And the reversion and reversions, remainder and remainders together with the rents and profits of all and singular the recited premisses, and all the estate, right, title, interest, claim and demand whatsoever of him the said *William Dormer* of, in or to the said several and inclosed pastures and pasture grounds, meadows, lands, tenements and premisses, and of, in and to every

* P. 297.

every part and parcel of the same, except before excepted; To have and to hold all and singular the said several and inclosed pastures and pasture grounds, lands, tenements, hereditaments and premisses, and every part and parcel of them, and every of them, with their and every of their rights, members and appurtenances, unto the said *William Moor* and *John Carter*, their heirs and assigns for ever; Upon trust and confidence nevertheless in them the said *William Moor* and *John Carter*, their heirs and assigns reposed, and to the uses, intents and purposes hereafter in these presents expressed, limited and declared, that is to say, To the intent and purpose, that they the said *William Moor* and *John Carter*, and the survivor of them, and the heirs of the survivor of them shall permit and suffer the said *William Dormer* for and during the term of his natural life, from time to time to receive and take all the rents, issues and profits of all the said several inclosed pastures, meadows, lands, tenements, * rents, hereditaments and premisses to the sole and proper use of him the said *William Dormer* and his assigns; And after the decease of the said *William Dormer*, then to permit and suffer the said *Frances*, now wife of the said *William Dormer*, and her heirs for and during the term of her natural life from time to time to receive, perceive and take all the rents, issues and profits of all the said several and inclosed pastures, meadows, lands, tenements, rents, hereditaments and premisses to the sole and proper use and behoof of her the said *Frances* and her assigns; Upon this farther trust and confidence, that after the decease of the said *Frances* now wife of the said *William Dormer*, they the said *William Moor* and *John Carter* and their heirs, and the survivor of them, and his heirs, shall stand seised of all and singular the said several and inclosed pasture grounds, meadows, lands, tenements, hereditaments and premisses, To the use and behoof of the said *Robert Dormer*, and of his heirs and assigns for ever, and to and for no other use, intent or purpose whatsoever. And lastly it is covenanted and agreed, and it is the true intent and meaning of these presents, that if the said *William Dormer* shall at any time hereafter, by any writing subscribed and sealed by him in the presence of two or more credible witnesses, in express words, signify and declare his intention to revoke or make void these presents, or the estate and use herein or hereby limited and appointed unto the said *William Moor* and *John Carter* and their heirs, of or in the premisses or any part thereof, that then and from thenceforth touching such of the said lands and premisses, whereof such declarations shall be

Term. Trin. 31 Car. 2. In Scacc.

be so made, the use and estate by these presents limited and granted shall cease, determine and be utterly void; any thing in these presents contained to the contrary in any wise notwithstanding.

In witness whereof, &c.

The jury farther find that it was indorsed upon the said indenture thus:

Memorandum, That it is covenanted, concluded and agreed between all the parties to these presents, before the enfealing hereof, that immediately after the deceases of the within named *William Dormer* and *Frances Dormer*, and before the limitations of the uses therein limited, shall be any whit profitable or beneficial, that the within named *William Moor* and *John Carter* shall be farther trusted, that they and the survivor of them, and the heir of the survivor of them, shall permit and suffer *Jane Herbert*, now wife of *James Herbert*, niece to the within named *William Dormer*, to receive and take all the * issues and profits of the within * P. 299. granted premisses, for and during the term of five years from the deceases of the within named *William* and *Frances Dormer*, upon this confidence and trust nevertheless, That the said *Jane Herbert* shall detain and keep the said issues and profits until *Jane Herbert*, god-daughter to the within named *William Dormer*, arrive to the age of fifteen years, and in case the said god-daughter dies before the said time, and the said *Jane Herbert* the mother survives, then the said sums of money so raised to be to her sole profit, use and benefit; And with this farther trust, that at the said age of fifteen years of the said god-daughter, she shall deliver and be accountable for all the issues and profits to the said *Jane*, the god-daughter, for her sole benefit and use.

The jury farther find, That 9 April 20 Car. 2. the said *William Dormer* made his last will and testament in writing signed and sealed in the presence of two credible witnesses, by which he did give and devise as followeth:

I do give all my lands in *Woscot* alias *Walcot* or *Granborough* in the county of *Warwick*, with all their rents, rights and profits thereunto belonging, unto my nephew *William Dormer* and his heirs for ever, that is, in manner and form following, Provided always, and my will and meaning is, that my well beloved wife *Frances Dormer* shall first enjoy it immediately after my decease for the full term of her natural life, and that immediately after the decease of my said wife, then my will and meaning is, that my god-daughter Mrs. *Jane Herbert* shall enjoy it with all the profits and commodities thereunto belonging, during the term of five years,

years, beginning from the day of my aforesaid wife's decease; and in case she die, then to *Dorothy Herbert*, sister to the said *Jane Herbert*, shall enjoy the aforesaid five years of the aforesaid lands; and in case the said *Dorothy* die before she shall receive the aforesaid five years, then my will and meaning is, that my niece *Jane Herbert*, mother to the aforesaid *Jane* and *Dorothy*, shall enjoy all the rents and profits of the aforesaid lands in *Wooscot* alias *Walcot* or *Granborough* in the county of *Warwick*, for the term of five years, beginning from the day of my wife's decease, and after the expiration of the aforesaid five years, Then my will and meaning is, that my nephew, *William Dormer*, second son to my brother sir *Robert Dormer*, shall have the inheritance to himself and to his heirs for ever. Item, Whereas there is a suit at this time between my two nephews concerning 2000*l.* given by my brother sir *Robert Dormer*, to his younger son *William Dormer*, by virtue of a * codicil made by his father, and signed by himself in his life-time, which codicil one Mr. *Lane*, a lawyer of the *Inner Temple*, and myself perused, as being trusted by the said sir *Robert Dormer* for the aforesaid *William*, during his minority, by virtue of which codicil we found therein specified to be given to his son *William Dormer* 2000*l.* which sum, after the decease of my brother sir *Robert Dormer*, was by myself demanded of my nephew *Robert Dormer*, when he would pay it us in? Who answered, *That he hoped he might as well keep it as any other, paying use for it.* Upon which answer Mr. *Lane* and myself were content he should, and so it rested for that time, but myself going presently into *France* and leaving the whole business to Mr. *Lane*, who dying before I came back into *England*, and not having registered the aforesaid codicil, which as appeareth is now lost, only a copy thereof appears taken by a scrivener, which it seemeth is not sufficient for the recovering the aforesaid sum of 2000*l.* so that my nephew *William Dormer* is likely to lose his right; therefore in consideration of this I think myself bound in conscience to see him satisfied out of my own estate for our omission and great oversight of not having registered the said original. This I have written to shew how that I justify to the whole world in this my last will and testament, that there was such a codicil, wherein my brother sir *Robert Dormer* gave to his son, *William Dormer*, 2000*l.* and that his brother, *Robert Dormer* never denied payment thereof till now since his marriage, and my last coming out of *England*. Item, My will and meaning therefore is, that I do make my nephew *William Dormer* sole heir to my whole estate,

Term. Trin. 31 Car. 2. In Scacc.

estate; provided he doth observe the conditions before mentioned in this my last will. In witness, &c.

That the said *William Dormer*, the uncle, in November 20 Car. 2. died.

That the said *Robert Dormer*, lessor of the plaintiff, is nephew and heir of the said *William* the uncle, and the same person named in the said will.

That *William* the defendant is nephew of the said *William* the uncle, and the same person named in his said will.

That the term of five years expired in May 29 Car. 2.

That the said *William Dormer* the defendant, afterwards entered into the said tenement, and became seised, prout *Lex postulat*.

* That the said *Robert Dormer*, 1 Jun. 29 Car. 2. entered, and 1 Septemb. 29 Car. 2. made the lease to the plaintiff prout, who became possessed until ejected. And the jury say, That the tenements in the declaration and the tenements in the indentures of 25 and 26 Septemb. 7 Car. 2. and also in the said will dated 9 April 20 Car. 2. are the same. And that the said *William Dormer*, now defendant, and *William Dormer* the nephew, named in the said will, are the same. And the said *William Dormer*, now defendant, nephew of the said *William Dormer* the testator, did observe and fulfil all the agreements in the said will mentioned, and that the said *Frances Dormer* died in Apr. 22 Car. 2. And if upon the whole matter the devise be a revocation of the uses in the indenture, they find for the defendant, otherwise for the plaintiff. * P. 301.

West for the plaintiff. That the will is no revocation of the uses, because the words (*By express words*) exclude all implicit revocations; for every revocation must pursue the power, for an estate at common law could not be undone without an entry, *Coke upon Litt.* 237. a. and 10 Co. 144. *Scroop's case*, and *Hob.* 312. *Tibbot versus Lee*, come not to this case, nor *Frampton's case Moor* 736.

Serjeant *Croke* for the defendant. The interpretation of powers of revocation have been always favourable, because estates of inheritance depend thereupon. Here the will is a revocation, because when two acts cannot consist, the later is a revocation of the former. In some things the donor or feoffor shall bind a power to circumstances, as for a deed to be executed before three witnesses, &c. But where there is only a general expression, the later act shall satisfy those general words.

As for authorities, 1 Cr. 472. *Jones* 392. *Snape versus Turten*,
T 2

Term. Trin. 31 Car. 2. In Scacc.

Turton, Scroop's case, and Frampton's case, and Hob. Tibbol versus Lee, Latch 24. Harding versus Warner. Power of revocation upon tender of rings, *ipso declarante*, that he intended to make void the uses. There were two against two. *Noy 79. Jones 134. Palmer 429. 2 Roll. Rep. 393.*

Judgment was afterwards given, that the power of revocation was well executed.

* P. 302.

* *Lisle versus Grey. Antea 278.*

Uses.
Pollexf. 582.
2 Jon. 114.
2 Lev. 223.
2 Show. 6.
Postea 315.

SERJEANT Mainard for the plaintiff in the writ of Error. The words, *And so severally and respectively to every of the heirs male of the body of the said Edward Lisle*, cannot be intended to the sons as purchasers, but the words ought to be construed according to the rules of law.

Holt for the defendant much to the same purpose with sir *Creswel Levinz*.

North chief justice. Heir male is the description of the person, and the word *So* is intended onwards, and not in like manner. *Adjournatur. Vide post.*

Ralph Dutton Esquire, and Grizil his Wife, Plaintiffs; Nevil Pool Esquire, Defendant.

In B. R. Hill. 28 & 29 Car. 2. Rot. 1123.

Assumpsit.
1 Danv. Ab.
84. p. 3.
1 Vent. 319,
332.
2 Lev. 210.
2 Jones 102.
3 Keb. 786,
814, 830, 836.

IN trespass upon the case. The plaintiffs declare, That whereas sir *Edward Pool* knight, father of the said *Grizil* was possessed and lawfully interested of and in certain timber trees growing in a certain park called *Oaksey-Park* in *Wiltshire*, 1 May 26 Car. 2. intended to cut down and sell the same to raise portions for his children, of which said intention the said defendant having notice, he the said defendant then at *Sherborn* in the county of *Gloucester*, in consideration that the said sir *Edward* at the defendant's special instance and request would forbear cutting the said trees, did promise the said sir *Edward*, that he the said defendant would well and faithfully pay to the said *Grizil* 1000*l.* And the plaintiffs in fact say, that the said sir *Edward* after the making the said promise did not cut any of the said trees, and yet the defendant did not pay the said *Grizil* whilst she was sole, nor the said sir *Ralph* and *Grizil*, or either of them after their marriage, the said 1000*l.* though thereunto requested, *Ad damnum* 1000*l.* Upon *Non Assumpsit* pleaded, and verdict for the plaintiff, and damages 1000*l.* and judgment,

Term. Trin. 31 Car. 2. In Scacc.

ment, the defendant brings a writ of error, and assigns the general error.

* *Holt* for the plaintiff in the writ of error. The promise is made to sir *Edward Pool*, and the action is brought by *Grizil* and her husband, to whom the payment was agreed to be made, which ought not to be. 3 *Cro.* 369. *Jordan* versus *Jordan* 619 and 652. *Levet* versus *Hawes*, 849 and 881. *Rippon* versus *Norton*, *Roll. Abr.* 1. 31. pl. 6. and 30. pl. 3. *Archdale's* case. A promise to pay money to the attorney of *A.* the action may be brought by *A.* or his attorney. *Latch.* 206. *Legat's* case. P. 303.

Pollexfen for the defendant in the writ of error. The action is maintainable by the party to whom the promise was made, or to the *Cestuy que Use*, the promise was indifferently, *Roll. Abr.* 1. 31. Z. pl. 8. *Oldham* versus *Bateman*, 269. *Starkey* versus *Mills*, and of this opinion were all the justices and barons; and judgment was affirmed. 2 *Co.* 47. a. pl. 175. *Sprat* versus *Agar*, *M.* 1658. *B. R.*

Knight versus *Peachy* and *John Freeman*.

ERROR to reverse a judgment in *B. R.* in an action of covenant, wherein the plaintiff declares against the defendants as surviving executors of *Michael Knight* deceased; for that whereas one *Peter Wood* was seised of a toft, &c. in *London*, in fee, whereon a messuage stood, called the *Tallowchandler*, 4 March 22 Car. 2. demised by indenture the same to one *William Ginger*, from Lady-day then following, for 51 years, who entered and became possessed; That the said *William Ginger*, 1 Sept. 22 Car. 2. built a new messuage upon the said toft, and 8 Sept. 22 Car. 2. by indenture demised the said messuage, &c. to *John Web*, from Michaelmas following, for twenty-one years, at 28l. rent sterling; and the said *John Web*, for himself, his executors, administrators and assigns did covenant to pay the rent, and to repair the premisses, and entered and became possessed; and 1 December 23 Car. 2. granted and assigned the said premisses to the said *Michael Knight*, and all his estate and term therein, who entered and became possessed; and 2 Dec. 24 Car. 2. made his will, and the defendants and one *Thomas Read* deceased, his executors, and died. That the defendants took upon them the execution of the said will, and entered, and became possessed. That the said *William Ginger* by indenture dated 20 June 25 Car. 2. granted all the premisses, * and all his * estate P. 304.

Term. Trin. 31 Car. 2. In Scacc.

estate therein to the said *William Peachy* the plaintiff, to which grant the defendarts, &c. did attorn, by reason whereof the plaintiff became possessed of the reversion of the said messuage for the residue of the said twenty-one years. That the said *Thomas Read* died 1 March 1673. and 84^l. for three years, ending at *Michaelmas* last, was behind, and some repairs wanting; and so the defendants have broken their covenant *ad domnum 200l*.

The defendants plead, that after the making the said indenture of demise and grant, and assignment by the said *John Web* to the said *Michael Knight*, and after the said grant and assignment to the plaintiff, and before any part of the rent of 48^l. was behind, viz. 10 October 25 Car. 2. the defendants assigned the premises to one *Evan Powel*, of which the plaintiff had notice. The plaintiff replies, That the said assignment was made by fraud and covin between the said defendants and the said *Evan Powel*, to defraud the said plaintiff of the rent aforesaid. To which replication the defendants demurred, and judgment was given in *B. R.* for the plaintiff; and the defendants brought a writ of error, and assigned the general error. And serjeant *Weston* for the plaintiff in the writ of error. That cannot be said to be by fraud, which the law allows to be done; and here the assignees are not restrained from assigning, and therefore the assignment cannot be said to be by fraud generally; but some particular fraud ought to have been alledged as perception of rents, continuance in possession, &c. For in all cases where the thing stands indifferent to be fraudulent or not, there fraud cannot be pleaded generally, but the same must be set forth in particular. *Plowd. 46. b. Mich. 9 H. 6. 41.* cited there.

Pollexfen and *Holt* for the defendant in the writ of error. If fraud cannot be generally assigned here, a landlord can never be sure of his rent, for he cannot tell upon what terms his lessee assigns the tenements.

In case of a recovery by default, fraud may be generally alledged, as in *Wimbish* and *Talbois's* case, *Plowd. 47.* but if after a verdict, there it must be specially alledged; and *Tresham's* case, 9 Co. 110. a. the resolution there is direct for this case, and afterwards the parties agreed.

Term, Trin. 31 Car. 2. In Scacc.

• *Bambridge versus Bates, Cushee and Date.* * P. 305.
Middlesex.

TRESPASS for breaking the plaintiff's house at the parish of St. *Mary Matfellow*, alias *White-chappel*, and taking away his goods, and names them, *ad damnum* 150*l*. The defendants plead Not guilty, and the jury find a special verdict, *viz.*

Trespass.
Postea 328,
337.

That by an act of parliament 12 Car. 2 cap. 23. 'twas enacted, That from and after the 25th day of December 1660. there shall be throughout your majesty's kingdoms of *England*, dominion of *Wales*, and town of *Berwick upon Tweed*, raised, levied, collected and paid unto your majesty, during your life, for beer, ale, cider, and other liquors herein after mentioned, the several rates, impositions, duties and charges therein after expressed, and in manner and form in the said act following, *viz.* That all common brewers of beer and ale shall once in every week, and all inn-keepers, alehouse-keepers, victuallers, and other retailers of beer, ale, cider, perry, metheglin, strong-water, brewing, making or retailing the same, shall once in every month make true and particular entries at the office of excise, within the limits of which the said commodities and manufactures are made, of all beer, ale, perry, cider, metheglin, strong-water, or other the liquors, aforesaid, which they or any of them shall brew, make or retail in that week or month respectively, as aforesaid; And that all such common brewers who do not once a week make due and particular entries, shall forfeit 5*l*. and that every such inn-keeper who doth not make true and particular entries once a month, 5*l*. And that every alehouse-keeper, victualler, and other retailer, who doth not once a month make due and particular entries, shall forfeit 20*s*. And that every common brewer who shall not pay, and clear off within a week after he made his entry, or ought to have made his entry, as aforesaid, shall pay double the value of the duty; And that every inn-keeper, alehouse-keeper, victualler, or other retailer who shall not pay and clear off within a month after he made his entry, or ought to have made his entry, as aforesaid, shall pay double the value of the duty; the said respective forfeitures to be levied upon their goods and chattels in such manner and form as hereafter in this act is ordained and directed; And that all forfeitures and offences

* P. 306.
ces

Term. Trin. 31 Car. 2. In Scacc.

ces made and committed against this act, or any clause or article therein contained, shall be heard, adjudged and determined by such person and persons, and in such manner and form, as hereafter in and by this act is directed and appointed, that is to say, All such forfeitures and offences made and committed within the immediate limits of the chief office in *London* shall be heard, adjudged and determined by the said chief commissioners and governors of excise appointed by his majesty, or the major part of them, or by the commissioners for appeals and regulating of this duty, or the major part of them in case of appeal, and not otherwise; And all such forfeitures and offences made and committed within all or any of the counties, cities, towns or places within this kingdom, or dominion thereof, shall be heard and determined by any two or more of the justices of the peace residing near to the place where such forfeitures shall be made, or offence committed; and in case of neglect or refusal of such justices of the peace by the space of fourteen days next after complaint made and notice thereof given to the offender, then the sub-commissioners, or the major part of them, appointed for any such city, county, town or place, shall, and are hereby empowered to hear and determine the same; and if the party find himself aggrieved by the judgment given by the said sub-commissioners, he shall or may appeal to the justices of the peace at the next quarter-sessions, who are hereby empowered and authorized to hear and determine the same, whose judgment therein shall be final, which said commissioners for appeals, and regulating this duty, and the chief commissioners for excise and all justices of peace and sub-commissioners aforesaid, respectively, are hereby authorized and strictly enjoined and required, upon any complaint or information exhibited and brought of any such forfeiture made, or offence committed contrary to this act, to summon the party accused, and upon his appearance, or contempt, to proceed to the examination of the matter of fact, and upon due proof made thereof, either by the voluntary confession of the party, or by the oath of one or more credible witnesses (which oath they or any two or more of them have hereby power to administer) to give judgment and sentence according as in and by this act is before ordained and directed, and to award and issue out warrants under their hands for the levying of such forfeitures, penalties and fines, as by this act are imposed for any such offence committed upon the goods and chattels of the * offender, and to cause sale to be made of the said goods and chattels, if they shall not be redeemed

Term. Trin. 31 Car. 2. In Scacc.

deemed within fourteen days, rendering to the party the overplus if any be, and for want of sufficient distress to imprison the party offending till satisfaction be made, and that all parts of the cities of *London* and *Westminster*, with the borough of *Southwark*, and the several suburbs thereof, and parishes within the weekly bills of mortality, shall be under the immediate care, inspection and management of the said office, and that if any person or persons shall at any time be sued or prosecuted for any thing by him or them done or executed in pursuance of this act, he or they shall and may plead the general issue, and give this act in evidence for his defence, and if upon a trial the verdict shall pass for the defendant or defendants, or the plaintiff or plaintiffs be nonsuited, then such defendant or defendants shall have double costs to him or them awarded against such plaintiff or plaintiffs.

That this act was confirmed 13 Car. 2. cap. 7.

That 22 and 23 Car. 2. cap. 5. It was enacted as followeth, viz.

That from and after the 24th day of *June* 1671. there shall be throughout your majesty's kingdom of *England*, dominion of *Wales*, and town of *Berwick* upon *Tweed*, raised, levied, collected and paid unto your majesty, your heirs and successors, during the space and term of six years, from the 24th day of *June* aforesaid, and no longer, for beer, ale, cider, and other liquors herein after expressed by way of excise, over and above all other duties, charges and impositions by any former act and acts, set and imposed in manner and form following, That is to say, *inter alia*, For every gallon of low wines of the first extraction, made of any kind of imported wine or cider, or other materials imported, to be paid by the maker or seller. 2. And that every the common brewers and retailers of ale and beer, and all and every other person and persons liable to and chargeable with the pain of any excise, or new impost upon beer, ale, or other exciseable liquors, by virtue of any former law of excise now in force, shall also be liable to, and charged with, the payment of the additional rates and duties hereby imposed, which said additional rates and duties shall be collected, levied and paid in the same manner; and the same persons liable to, and chargeable with the pain thereof, shall, in case of neglect or default of entry or payment, or in case of any other neglect or offence * tending * P. 308. to defraud his majesty, or any of his officers, farmers or collectors of the duties or rates hereby imposed, be also subject

Term. Trin. 31 Car. 2. In Scacc,

ject to the like proceedings, judgments and executions, and shall likewise incur the same penalties, fines and forfeitures as he or they, his or their heirs and executors or administrators should or might have been subject to, or ought to have incurred for the non-payment of any former duty of excise, or for the like offence committed against any former law of excise now in force; and that all forfeitures and offences made and committed against this act, or any clause, article or sentence herein contained, and all appeals, shall be heard, adjudged and determined by such person and persons, and in such manner and form, as the like forfeitures and offences against the former laws of excise are thereby appointed to be heard and determined, and not otherwise; And moreover, that all commissioners, sub-commissioners of excise, all commissioners of appeals, justices of peace, constables, and other officers and ministers whatsoever, shall have, use, and exercise the same jurisdiction, power and authority, whether it be judicial or ministerial for the better ordering, collecting, levying and securing the duties, and the additional rates and duties hereby imposed, as he or they could have had, used or exercised for the better ordering, collecting, levying or securing any former rates or duties of excise whatsoever; And that all fines, penalties and forfeitures, which shall be incurred by reason of any offence committed against this act, shall be employed, one moiety thereof to the use of the king's majesty, his heirs and successors, another moiety thereof to him or them that shall or will inform or sue for the same; and also, that if any person or persons shall at any time be sued or prosecuted for any thing by him done in pursuance or execution of this act, he and they shall and may plead the general issue, and give this act in evidence for their defence; and if upon trial a verdict shall pass for the defendant or defendants, or the plaintiff or plaintiffs be nonsuited, then every such defendant or defendants shall recover his or their double costs.

That by another act of parliament 29 Car. 2. It is enacted, That from and after the 24th Day of June 1677 there shall be throughout your majesty's kingdoms of *England*, dominion of *Wales*, and town of *Berwick upon Tweed*, raised, levied, collected and paid unto your majesty, your heirs and successors, during the space and term of three years, from the 24th Day of June aforesaid, and no longer, for beer, ale, * cider and other liquors herein after expressed by way of excise, oyer and above all other duties, charges and

Term. Trin. 31 Car. 2. In Scacc.

and impositions by any former act or acts set or imposed in manner and form following, viz. (*inter alia*) For every gallon of low wines of the first extraction, made of any kind of imported wine or cider, or other materials imported, to be paid by the maker or seller. 2. And that the several rates and duties of excise upon beer, ale and other liquors, shall be raised, levied, collected and paid unto your majesty, your heirs and successors, during the space and term of three years, as aforesaid, and no longer, in the same manner and form, and by such rules, means and ways, and under such penalties and forfeitures, as are contained, mentioned, expressed and directed in the before cited act of parliament of 22 and 23 Car. 2. That the plaintiff at the time of the trespass, and for 3 years before was, and continued a common distiller of strong-waters at *Wapping in Middlesex*, within the jurisdiction of the chief commissioners of excise, and during all the time aforesaid, did exercise the art and mystery of a distiller of strong-waters, and did extract a certain low wine of the first extraction. That one *William Hall*, gent. within the time aforesaid, viz. 2 Nov. 29. Car. 2. at the principal capital office of excise, in the parish of *saint Peter the Poor in London*, did exhibit before the chief commissioners and governors of the excise, an information as well for the king as for himself, that the plaintiff being a distiller and maker of strong-waters, and of low wines within the jurisdiction of the said office, between 23 August 29 Car. 2. and 24 September following, being one month, made 5880 gallons of low wines of the first extraction of cider, or other materials imported, and did not pay the excise due for the same, contrary to the form of the statute in such case made and provided. To which information the plaintiff appeared, and pleaded Not guilty. And so far it proceeded, that 13 November 29 Car. 2. the commissioners proceeded to the examination of the matter aforesaid, and thereupon it did appear by the oath of credible witnesses, that the plaintiff had within the time aforesaid made 5880 gallons of low wines of the first extraction of materials imported, and had not paid the excise due for the same; and thereupon the said commissioners did adjudge that the plaintiff should forfeit 98*l.* being double the value of the said low wines, to be levied of his goods and chattels.

* That 18 December 29 Car. 2. the said commissioners, at * P. 310. the prosecution of the said *William Hall*, made their warrant to the defendants, being messengers belonging to the said office, reciting the judgment aforesaid, and by which the

Term. Trin. 31 Car. 2. In Scacc.

the said commissioners did authorize and require the defendants, in his majesty's name, immediately to enter into the plaintiff's house and distillatory, and to levy, by way of distress, the said sum of 98*l.* of the goods and chattels of the plaintiff, and the same goods to be disposed according to the said a*ct*.

That the defendants pursuant to the said warrant, 10 Jan. mentioned in the declaration, did enter into the plaintiff's house, and did take the goods in the declaration mentioned, for the said 98*l.* and that the same are not sufficient to answer the said sum of 98*l.*

That there are dregs of sugar, called molasses, made beyond sea, which are brought into *England*.

That there are molasses which are made in *England*.

That the low wines, in the information and judgment specified, were extracted from the molasses, which were extracted and made in *England* from sugar imported from beyond the seas, and divers other *English* materials.

That the sugars, from which the molasses of which the said low wines were extracted, were ten times of more value than the rest of the materials which were used by separation of the aforefaid molasses from the sugar aforefaid.

That the molasses can never be made sugar again.

That the plaintiff in making the said low wines doth usually add seven hogheads of wash, in which are put one quarter of malt, and twelve hogheads of water to produce the extract of 200 gallons of low wines.

That the principal spirit of that extraction is produced from the molasses. But whether upon the whole matter the defendants be guilty or no, the jurors ignorant, & petunt advisamentum Curiae.

Williams for the plaintiff. The question is, Whether molasses be an imported material within the statute of 29 Car. 2.

1. This a*ct* is intituled a free gift of the commons in parliament, without any recompence moving from the crown, and therefore ought to be expounded beneficially for the people.

* P. 311. * 2. 'Tis a new charge and imposition upon the subject, and odious to the people by way of excise,

3. 'Tis found that molasses made in *England* is used in making of low wines, and 'tis found that this low wine is made of these molasses.

The a*ct* distinguishes between low wines made of foreign molasses, and wine made of *English* materials.

No

Term. Trin. 31 Car. 2. In Scacc.

No low wine is made of *English* material alone.

Materials here are intended immediate materials, *viz.* The molasses which are *English*.

Object. Materials shall be such as comprehend the principal part in value.

Resp. The bulky part is the materials, and not the value; and here the lump is the quarter of malt; as *English* cloths are so called if they be made of *English* cloth, though there be *French* lace upon them of double the value.

And the material cause is that which is immediate, as cloth is the material cause of a garment, not the wool.

And 'twill be a hard construction to put upon the trade of distillers, who are numerous; and yet the whole rent reserved upon the duty from them to the farmers is but 50*l.* per Annum, which would be 5000*l.* if they should be said imported materials, and 'twould not be worth their labour, if so, and multitudes would be undone.

Ward for the defendant. There are two questions.

1. If an action of trespass will lie against the officers, because they acted by authority from the commissioners of excise, who have jurisdiction of the cause, and ought not to be questioned here?

2. Whether the duty be due here to the king.

1. It doth not lie, 8 Co. Dr. *Bonham's* case, 10 Co. the case of the *Marshalsey*. And when a man acts as judge, he is not questionable. 1 Cr. 341. *Pidgeon's* case. And the plaintiff ought to have brought his appeal, and not an action of trespass.

Object. Mich. 19 Car. 2. *Terry* versus *Huntington*.

Resp. The question there was, Whether the liquors were strong-waters perfectly made? And the jury found against the fact, and so the commissioners had not jurisdiction.

To the 2*d.* Here is a duty due for these low wines.

* 1. They are made of materials imported, *viz.* Dregs * P. 312. of sugar and lees of wine, which are not *English*, and though *English* materials are added, that alters not the case, because 'tis found, that all the *English* ingredients together, without these materials, would not have made these low wines, & ubi major pars ibi totum. In the case of alnage, which is only for woollen cloth; yet resolved that linsey woolsey pays alnage, though but part wool.

Upon the statute of tillage, the major part gives the denomination, when prices of corn exceed such a value; the common price regulates that statute.

Crown's case, information upon the statute of 22 Car. 2.
the

*

Term. Trin. 31 Car. 2. In Scacc.

the last clause thereof, which says, That all wines remaining in store shall pay the duty. The defendant there imported wines in 1566. and so the wines were not remaining in store, because imported before the act; and yet resolved that they shall pay; and so agreed in a writ of error by *Hales and Vaughan*. *St. Hill's* case, importation of wheat meal was within the statute of tillage.

As to the reservation of the rent to be but 50l. 'tis not found in the verdict. *Adjournatur. Post.*

Memorandum, In September 1679. *Francis Barrel* serjeant at law, who had been a reader of the *Middle Temple*, died in *Kent*.

Memorandum, October 22. Sir *William Jones*, knight, attorney general, surrendered up his patent, and I took the acknowledgment thereof; and so the place of attorney general became void, by leave from his majesty. And afterwards about October 25. sir *Creswel Levinz*, knight, was made attorney general.

By the stat. of 26 H. 8. cap. 3. The revenue of the first-fruits and tenths of the clergy was granted to the crown, and the several bishops were thereby appointed collectors thereof in their respective dioceses. The auditor was to make up their respective accounts, which were by him transmitted into the office of the pipe, according to the course of the exchequer, where the bishop had his *Quietus est*, and where all accountants accountable in the exchequer have their * *Quietus est* at this day. But the auditor was not thereby enjoined to give the bishop a duplicate of his account; and it was needless then, because he had his *Quietus est* from the pipe, without fee or other reward for the same.

* P. 313.

By the statute of 32 H. 8. cap. 45. That course was altered, and a court of first fruits and tenths was erected, consisting of a chancellor, treasurer, attorney, and two auditors, who were to make up the accounts of that revenue, and being fairly ingrossed, were to remain in the same court as the king's records, and not transmitted into the pipe: But no *Quietus est* or duplicate of his account was thereby enjoined to be made and given to the bishops.

By the statute of 7 E. 6. cap. 1. The auditors were enjoined to make forth and give duplicates of their accounts
at

Term. Trin. 31 Car. 2. In Scacc.

at the reasonable request and cost of the accountant, where-
in the bishops were included, and accordingly the practice
has gone ever since the beginning of queen *Elizabeth*; and
I never heard it was disputed by any until the archbishop of
York, when bishop of *Carlisle*, was pleased to call his du-
plicate of his account, a *Quietus est*, and so would pay no-
thing for it.

Queen *Mary* by virtue of an act of parliament made in
the second session in the first year of her reign, cap. 10.
by her letters patent dissolves the said court of first-fruits,
and then creates a new office and officer, viz. The re-
membrancer of the first-fruits and tenths, who was to take
all compositions, and to enter all accounts, and to make out
all process against *Non-solvents*, and all proceedings therein,
to be under the survey of the court of exchequer.

In the second and third year of *Philip* and *Mary*, the
clergy were exonerated from payment of first-fruits and
tenths.

In the first year of queen *Elizabeth*, cap. 4. The pay-
ment of first-fruits and tenths was restored to the crown,
and all things concerning the same that remained untaken
away the eighth of *August* in the second and third year of
the said *Philip* and *Mary*, were then restored and settled un-
der the survey and government of the exchequer, but the
court * of first-fruits was not revived, for that was dis- * P. 314.
solved before the said eighth of *August*, and the remem-
brancer being then established, continues to this day in
every degree, sort or condition, as it was at or before the
eighth of *August* in the said second and third year of *Philip*
and *Mary*, at which time the clergy were exonerated from
payment of first-fruits and tenths.

The archbishop requires auditor *Bridges* to examine,
state and pass his accounts for the year 1675, 1676, and
1677, according to the method I conceive he has sent up,
which is not pursuant to the auditor's trust, and would be
prejudicial to the king to the loss of all arrears owing by
the incumbents; for in his state no arrears of the clergy are
continued in charge. Not understanding the true nature of
those accounts, in that they relate not barely and simply
to the bishops receipts and payments, but to the whole re-
venue of the respective dioceses, each incumbent is thereby
charged

Term. Mich. 31 Car. 2. In Cam. Scacc.

charged and discharged. And if no arrears be continued in charge upon the incumbents, they all, or any of them may plead the account made out in the bishop's name (when entered upon record) for their discharge.

* P. 315.

* Term. Mich. 31 Car. 2.

In the Exchequer Chamber.

John Lisle *versus* John Grey. Error out of B. R.
Ejectment. Northumberland.

Uses.
Pollexf. 582.
2 Jones 114.
2 Lev. 223.
2 Show. 6.
Antea 278,
302.

THE plaintiff declares of the demise of *William Lisle* of four messuages, twenty acres of land, two hundred acres of meadow, two hundred acres of pasture, and three hundred acres of moor in *Acton*, in the parish of *Felton*. Upon Not guilty pleaded, the jury find a special verdict.

That one *John Lisle* was seised in fee of the tenements in question, and so seised 15 August 15 Car. 1. by indenture between himself of the one part, and *John Robson*, and others, of the other part, for settling the premises in his blood; and in consideration of the natural love and affection to those to whom the estates afterwards are limited, and for the advancement of his son *Edward Lisle*, covenants to stand seised, to the use of himself for his life without impeachment of waste, the remainder to the use of the said *Edward Lisle* for his life, the remainder to the use of the first son of the said *Edward*, and the heirs male of his body, so to the second, third and fourth sons, and so severally and respectively to every of the heirs male of the body of the said *Edward Lisle*, lawfully to be begotten, and the heirs male of the body of such heirs male lawfully to be begotten, according to their ages and seniorities, and for default

of

Term. Mich. 31 Car. 2. In Cam. Scacc.

of such issue, to the use of *William Lisle* of *Warkworth*, gent. for his life, and after his decease, to the use of his first son in tail male, and so to his other sons, the remainder to the right heirs of the covenantor.

Provided, That if it shall happen the said *Edward Lisle* to die without issue male of his body lawfully begotten, then the said covenantor and his heirs shall stand seised, to the use, intent and purpose that they shall raise out of the profits the several sums of 100*l.* a-piece for each and every of the * daughters of the said *Edward Lisle*, to be paid to * P. 316. the eldest first, and so in order according to their several ages; and the said *John Lisle* had issue *Edward* his eldest son.

1 Mar. 17 Car. 1. *John Lisle* died so seised.

Edward had issue only a daughter still alive.

30 September 1649. *Edward* made a feoffment to the use of *Thomas* and *John Forster*, and their heirs, with warranty against all men.

Hill. 1649. a recovery was suffered wherein *Ralph Forster* was demandant, the said *Thomas* and *John Forster* tenants, and the said *Lisle* vouchee, and he vouched over the common vouchee.

1 May 1674 *Edward Lisle* died without any issue, but his daughter; That at his death all the estates limited by the indenture of 15 August 15 Car. 1. preceding the limitation to *William Lisle* named in the said indenture, and now lessor of the plaintiff, did end and determine.

The said *William Lisle* was cousin of the whole blood of the said *John Lisle*.

20 January 28 Car. 2. *William Lisle* entered upon the possession of the defendants, and made the lease to the plaintiff, who entered and was possessed until the defendants ejected him. And if for the plaintiff, for the plaintiff, &c.

And judgment was given in *B. R.* for the plaintiff, and now the defendants bring a writ of error.

And I conceive judgment ought to be reversed.

The single question in this case will be (for I do not think the proviso which appoints the daughters portions will make any doubt, because 'tis found in the verdict, That all estates precedent to *William Lisle's* estate determined upon the death of *Edward*) What estate *Edward Lisle* had by virtue of the indenture of 15 August 15 Car. 1. for if he had but an estate for life, then the judgment ought to be affirmed; but if he had an estate-tail, then the judgment ought to be reversed; and I hold that he had an estate-tail.

U

There

Term. Mich. 31 Car. 2. In Cam. Scacc.

There are but three arguments that I can find, that can be urged why he should have but an estate for life, viz.

1. The intent of the covenantor.
2. That the word (*heirs*) here must be taken for sons or issues.
3. That heirs male here must take by way of a springing use.

* P. 317. * 1. *As to the first.* That it was the intent of the covenantor, that the heirs male of *Edward* should take by purchase, seems apparent.

1. From these words, so, viz. as the four sons, so every other heir male have it.

2. Severally and respectively as they become in being.

3. Why should but four sons be named, had not the covenantor intended that every other son should take by the subsequent words?

4. It's provided, that *Edward* shall have power to make provision for the daughters, which needed not have been, if the covenantor intended an estate-tail.

5. To the heirs male of such heirs male, had been need-
less.

6. To the heir male according to their seniority.

All which do shew that it was the intent of the covenantor to have *Edward* to be but tenant for life, and his sons to take as purchasers; notwithstanding which intent, yet if such intent cannot consist with the rules of law, the limitation will be void, and therefore a grant of lands by deed executed by livery and seisin to *A.* for ever is but an estate for life, though the feoffor intended otherwise. *Doct. & Stud. lib. 1. cap. 24. fol. 39. b.* So a gift by deed to a man and his heirs for twenty years shall go to the executors. *Lit. sect. 740. Doct. & Stud. lib. 2. cap. 20. f. 93. b.* So a feoffment to *A.* upon condition, that if he pay not *B.* a certain sum, *B.* shall enter, yet *B.* cannot enter.

And this holds as well in case of a use, as at the common law; for before the statute 27 H. 8. after uses had gained the reputation of inheritances descendible, the common law directed the descent of them, and therefore there was *possessio fratris* of a use, as well as of land. 5 E. 4. 7. 4 Co. 22. a.

Uses are now reduced to the rules of the common law. 1 Co. 87. b. *Corbet's case*, 6 Co. 34. *Fitzwilliams's case*.

A feoffment to the use of *A.* and his issues male of his body makes not an estate-tail. *Roll. Abr. Tit. Estate* 837. R. pl. 1 and 2.

And therefore in our case it being expressly against the rule

Intent, inconsistent with the rules of law, not to be regarded, *Bridgeman* 85. *Verba intentioni, non e contra, debent interpretari*, 8 Co. 94.

Use governed by the rules of law.

3 Cro. 856. *Atwater versus Bird*.

Term. Mich. 31 Car. 2. In Cam. Scacc.

rule of law, that where the ancestor takes an estate for life, and afterwards the land is limited to him and the heirs of his body (*heirs*) shall be a word of limitation. 1 Co. 104. a. *Shelley's case*. These words shall not be construed according to the intent of the party, but according to the rule of law, * and so *Edward* shall be in of an estate-tail executed * P. 318. by virtue of these words.

2. *As to the second argument*. Where this limitation is to the heirs male, that is, to his (issues) male, and so as much as (sons.) Heir not taken for issue.

True it is, in the scripture phrase 'tis sometimes so taken, as, *This is the heir, let us kill him*; and St. Paul, *The heir whilst he is a child is under tutors and governors, and differeth not from a servant*. Husband, so called after divorce, to describe the person, 8 Co. 73. a.

But in our law 'tis never taken so, no not in a will.

In *Foster and Ramsey's case*, Mich. 1657. B. R. The case was to this purpose, thus: Sir Robert Ramsey had issue four sons, Robert, Nicholas, John and George; Robert being an alien had only daughters; Nicholas had issue Patrick; John by his will gives his land to the heir of his brother Nicholas in fee, Nicholas being then alive. Resolved, Patrick the son did not take; and yet in common parlance the eldest son is called heir. 2. It might amount to a description of the person, and to enure as an executory devise, viz. To the heir of my brother Nicholas. 1. To the person who shall be heir at the death of my brother Nicholas; and yet resolved *ut supra*: For the proper use of the word *heir*, is to make an inheritance. 1 Co. 103. b. *Shelley's case*. And should the word *heir* be otherwise taken, and only as a description of the person, it would make strange alteration, especially in wills. 9 Co. 127. b. Sunday's case.

Now if this word cannot be taken for son or issue in a will, much less in a deed, which is contrived by learned advice.

The third and last argument is, That this estate may enure to the heirs male by way of springing use; as thus, 'To the heirs male of *Edward*, that is, To such others as shall be his heirs male of his body, when they shall have a capacity so to take; and in the mean time the use to sleep in the covenantor; and so was *Pibus* and *Mitford's case* in B. R. 25 Car. 2. B. R. where the case was thus. Upon a special verdict in ejectment, Michael Mitford was seised in fee, and had issue two sons, viz. Robert by his first wife, and Ralph by his second wife, whose name was *Jane*, and

U 2

so

Term. Mich. 31 Car. 2. In Cam. Scacc.

so being seised by indenture covenants to stand seised, after the date of the said indenture, *To the use of the heirs male of his body begotten on the body of his said wife Jane, with a*
 * P. 319. * *remainder to his own right heirs.* And the question was, Whether any estate did accrue to the son by the second wife? And adjudged that there did by way of a springing use.

But I think there is good reason for that case, and yet not for the case in question. For in that case, 'tis true the covenantor had all the estate in him at and after the time of the covenant, but it cannot be said that he had an estate for life, or any other particular estate, and so 'tis not within the rule of *Shellie's* case. But in our case *Edward Lisle* was seised for life (and so the verdict expressly finds it) and so within the rule of *Shellie's* case directly.

And if this construction should be made, I cannot see in what case the rule in *Shellie's* case will hold; for all may be interpreted as springing uses, and to lie in *gremio Legis* till there be a son. And I take the rule in *Shellie's* case to be a positive law, of which there can no reason be given, but is a land-mark by which other cases are bounded; and such are many rules in our law, as why a fine should not be reversed for non-age of the conusor but by inspection during the non-age; and yet in a common recovery 'tis otherwise; so life and death are to be tried by jury, yet the life of the husband in a writ of dower, is to be tried by witnesses.

But upon the whole matter, I take this case to be the same with *Lewis Bowles's* case, and that here *Edward* had an estate-tail; and so judgment ought to be reversed.

Murray versus Eyton. Antea 260, 286.

Estate.
 2 Jen. 237.
 Pollexf. 491.
 Skin. 95.
 2 Show. 104.
 Feslea 338.

SAUNDERS for the plaintiff. The sole question depends upon the fine and conveyance levied and made by *Charles* earl of *Derby*; and in this case there are two points.

1. Whether the private act of parliament of 4 Jac. hath altered the estate-tail granted by the letters patent of 2 R. 3. and hath made it another estate, or hath altered it in some accidents.

2. Admitting that the estate be altered, Whether this new estate be restrained from alienation, by 32 H. 8. cap. 36.

It appears upon the verdict, that earl *Charles* received 1700*l.* for the sale of the land. But the land is of the value of 2000*l.* per Annum, and the purchasers have reimbursed themselves at least 40000*l.*

Before

Term. Mich. 31 Car. 2. In Cam. Scacc.

* Before I shall speak to the first point, I premise, 1. * P. 320.
That the reversion of the crown continues as it was at the time of the making of the letters patent. 2. If this act of 4 Jac. had not been made, the first estate-tail could not have been barred. 3. If the estate-tail is not barred, then neither the feoffment nor fine have made any discontinuance. *Co. Lit.* 355. a.

And that the act of 4 Jac. hath not altered the first estate-tail, I shall prove, by answering some objections already made, and then produce reasons.

1. *Object.* The first estate had no power to make jointures to the wives of them, or the wives of their eldest estates, which this estate hath.

Resp. It doth appear, that 'twas the intent that only a third part should be so disposed, which was no more than they should have for dower; and some of the lands are restrained from that privilege.

2. *Object.* By the letters patent every of the grantees was tenant in tail, and might commit waste; but so cannot tenant for life by this act.

Resp. The omission of that privilege doth not alter the estate; for if the king gives land upon condition, that the grantee shall not commit waste, and afterwards an act of parliament is made which releases that condition, that doth not alter the estate. So *e contra*, If an act of parliament shall take away the privilege of committing waste, it doth not alter the estate.

3. *Object.* By the letters patent the lands are to be holden by service of chivalry, and now here will be no tenure.

Resp. The tenure doth not alter the estate, because 'tis but a collateral accident.

4. *Object.* By the letters patent there was an intire estate given; but here are several estates, for life, and estates-tail, which are not intire.

Resp. These estates are all the same in quantity, which they would have been without the act, and it's the same estate as to duration; for whatsoever estates are here made, arise out of the estate tail, and the reversion is not touched, and that was the intent of the act, as appears by the saving; for the enacting part is, That the several persons shall have the several estates under the savings following. And this private act hath cut that, which was but one intire estate, into several pieces; and *Co. Lit.* 372. b. The third observation there is, * That if the king keeps the reversion, * P. 321.
none of the mesne estates can be barred; and so in *Stafford's* case.

Object.

Term. Mich. 31 Car. 2. In Cam. Scacc.

Object. If the heir shall bring a *Formedon*, he must count upon this act of 4 Jac. and therefore the estate arises by that act, which is the donor.

Resp. The heir need not here bring a *Formedon*, but may enter; but if he will admit himself out of possession, he shall not count upon the act only, but upon the letters patent and the act also; for suppose the first intail be spent, the king must count upon the letters patent in a *Formedon* in *Reverter*. This act is not the donor, but the crown; for the parliament cannot give, but by virtue of the legislative power estates may be settled or changed, as in this case.

There are some things to be observed, by which the intent of the act appears, that the estate-tail should not be altered, wherein there are remainders to several persons, in order, That (whereas before there was some dispute who were first to take) all persons might be satisfied with the order in this act prescribed concerning the same.

1. In the saving, there is livery and primer seisin reserved to the crown, as if the act had not been made, which could not be if the estates were new.

2. Power to make jointures for life, had an eye to the first estate-tail, for there is a power to bind the issue, but not the remainders; and so of leases; but the king should not be bound.

The intent of the parliament was to make a settlement in the family, and not to give the parties power to alien, for they intended by the saving to preserve the lands from alienation, as if the act had never been made.

As to the second point. That this estate is preserved by the statute of 32 H. 8. cap. 36. By the statute of 4 H. 7. cap. 24. and before 32 H. 8. cap. 36. a fine did not bar an ordinary estate-tail. True it is, that *Co. Lit.* 372. is contrary, and that it did bar; but it is but his opinion, and he cites no authority for it, and there are other authorities against his opinion. The statute of 32 H. 8. says, That there was diversity of interpretation and expounding of that statute, whether such fine should bar the issues in tail; and so it appears by the book of 19 H. 8. 6. which says, That the words of the act of 4 H. 7. are satisfied by barring the issues of tenant in fee-simple; and the issues in tail, though
* P. 322. in some measure privies, * yet they claim paramount the fine. And general words in an act of parliament do not comprehend an estate-tail, as in the case of *Premunire. Co. Lit.* 130. a. 11 Co. 63. Dr. Foster's case.

Between

Term. Mich. 31 Car. 2. In Cam. Scacc.

Between 4 H. 7. and 26 H. 8. were between forty and fifty years, and yet all that time no estate-tail was forfeited for treason. Now what reason had the judges to construe the general words of 4 H. 7. that a fine shall bind as well privies as strangers, that the issues shall be bound by a voluntary act of the tenant in tail, and yet that he shall not forfeit his estate for treason, which is the highest offence? The words of *Westm.* 2, are, That he shall not have *poteftatem alienandi*, and that *finis ipfo jure fit nullus*. That a fine was no bar to the issues in tail between 4 H. 7. and 32 H. 8. and *Br. Assurances* 6. 19 H. 8. 6. Amongst the judges who were of another opinion was *Brook* himself, which shews that either the reporter was mistaken, or my lord *Brook* had retracted his opinion, which was ten years after the writing his abridgment, and 1 *Anderson* 46. pl. 118.

Observations out of the statute of 32 H. 8. itself.

1. There was diversity of opinions in this point.
2. The words are, *Be it enacted (not declared)* so it is a constitutive, not a declarative act, it is *Introductivum novi Juris, non declarativum veteris*, that fines shall bar an estate-tail.
3. That the fines heretofore levied shall be a bar to the estate-tail, which shews that the statute of 4 H. 7. was too feeble to do it.
4. The third proviso, That the act shall not extend to such fines as were then in suit, by which it appears that there were recoveries of lands in tail of which fines had been levied.
5. The words of the statute are, That this act shall not extend to fines of lands, whereof the reversion is in the king, but that every such fine shall be of like force as it was or should be, if the act had not been made. Observe the statute of 34 H. 8. recites, that there was a great mischief by this doubt for a recovery, but not by a fine, which shews that fines were not used in such cases.

Serjeant *Maynard* for the defendant. The estate-tail is not extinguished, but altered. The points are,

1. Whether here is any estate within 34 H. 8.
2. Before 34 H. 8. a recovery did bar the issue in tail, in case of an adversary writ; but the question was of writs by consent. *Vide* 10 Co. 43. b. That a common recovery barred in all cases.

• By this act of 4 Jac, the first estate-tail is clearly barred, and consequently the clog upon it that it could not be barred, is gone; and earl *Charles* or his son shall not claim under

Term. Mich. 31 Car. 2. In Cam. Scaec.

under the old intail; so that the question now will be, Whether the estates created by 4 *fac.* shall be within the statute of 34 *H.* 8. And I hold that they are not, because those estates do not issue out of the reversion belonging to the crown, but only out of the old intail. When a third estate is to be raised out of the other two, it shall be said to come out of each of them, according to their respective capacities to grant or pass the same. *Trepast's* case. If the king and the earl of *Derby* had joined in a fine to raise an estate-tail, the earl had been the donor. An act of parliament adds strength to an estate, but is directed by the law. 8 *Co. Barrington's* case.

Object. It is an estate created by parliament, and that is the donor.

Resp. William tenant in tail is the donor. 2 *Co.* 15. and 16.

The reason why a common recovery did bar the issue, was not because it was a common assurance; but because at the common law every recovery was a bar. And though the statute of *Westm.* 2. *cap.* 1. is, that tenant in tail shall not alien *neq;* *per factum nec seoffamentum*, and a recovery is not named; yet in the same parliament *cap.* 4. If tenant in tail lose by default, he shall have a *Quod ei desorcent*, which shews that a recovery did bind before that statute; and at this day a common recovery bars a tenant in fee-simple, though there be no tenant of the freehold, and so was 12 *E.* 4. *Taltarum's* case. And when a recovery is had, it doth not appear to the court but that it was grounded upon good right; and it is incident to an estate-tail to be barred by common recovery. *Portington's* case.

To the second point, Whether a fine would bar the issue before the statute of 32 *H.* 8. There is no resolution in the case of 19 *H.* 8. 6. but *Dyer* 32. seems to make it a bar, and had not the law been so, the statute of 32 *H.* 8. would not have respected fines that had been past, for it would have been unjust to alter estates past, contrary to what the law was taken to be at the time of the passing them.

Object. *Notley's* case cited in *Stafford's* case, 8 *Co.* 78. a.

Resp. There is no such case to be found; but there is a case, 3 *Cro.* 595, and 612. *Stratfield* versus *Dover*; where disseisor of tenant in tail, the reversion being in the crown, levied a fine and barred the issue; but it is said there, * that the case went off upon point of pleading, (but seems contrary, 1 *Cro.* 430. by *Jones* justice): But the lord *Hob.* 332 and 333. taking notice of *Notley's* case says, That to comprehend

Term. Mich. 31 Car. 2. In Cam. Scacc.

prehend fines within 34 H. 8. by the words, *any other Thing*, was an oblique and indirect strain, and therefore all is granted upon Cro. 395. *Adjournatur*.

Player versus Vere. Antea 288.

SIR Robert Sawyer *contra*. *Object*. This by-law restrains trade. By Law.
1 Danv. Abr.

Resp. All customs and by-laws do restrain trade one way or other, as 5 Co. the chamberlain of London's case, and 8 Co. Waggoner's case; but this is not a trade, but an employment; as porters and coal-meters, &c. which are within the disposition of the city. 734. p. 5.
1 Sid. 284.
1 Vent. 21.
2 Keb. 27.
490, 501.

Object. This power is to be exercised by deputy.

Resp. The exercise of power in all great bodies ought to be delegated; and it is impossible otherwise to have it executed.

Object. Taylors of Ipswich's case, and 1 Roll. Abr. 364. Moor 576.

Resp. Those were orders to restrain trade by virtue of letters patent; but here is general custom to make by-laws.

The case of *Pain and Houghton* was upon this particular custom.

As to the penalty, it is common to every by-law; for what may be prohibited, may be prohibited upon a penalty.

1 Roll. Abr. 365. pl. 9. *Edwards's case*.

But if the by-law be naught for the fine, it may be good as to the other part of it. In every disposal of the places of corn-porters and coal-meters, a reasonable fine is reserved.

Consider the employment and the persons, and it will be thought reasonable that a strictness should be used more than ordinary.

Object. The defendant is not within the custom, because he is alledged to be a citizen. 1 Bulst. 11. *Green's case*.

Resp. There was a private company of *Butchers*, and not like this case, which is of all the city, where by-laws will bind strangers, as the custom of foreign bought and foreign sold; sale of an horse by an inn-keeper for his meat, &c.

* *Object*. 23 and 24 Car. 2. In this court, *Player versus* * P. 325. *Dean*; and in 24 Car. 2. *R. Player versus Bradnex*.

Resp. The objection was made in *Dean's case* by *Hale* chief justice, That that by-law was not for hire; and so it went off; and 22 Car. 2. in *C. B. Player versus Hutchins*. The court was divided.

But

Term. Mich. 31 Car. 2. In Cam. Scacc.

But admit that there is no such custom, or that it be doubtful, yet it is more agreeable to justice to grant a *Procedendo*, because otherwise there would be a failure of justice, because there is no other remedy to restrain these cars, which will, when without number, annoy the streets; and if a *Procedendo* be granted, then upon the trial, the custom may be controverted, and found specially.

Here *Player* cannot proceed in this court, because the action here must be brought in the name of the mayor, commonalty and citizens; but this by-law orders the action to be brought in the mayor's court by the chamberlain, and for this cause a *Procedendo* was granted in *Wilford's* case, *Moor* 403. pl. 538. so for calling a woman *where*. 2 Roll. Abr. 69. 1 Cro. 486. *Adjournatur ad proximam Cur.*

Afterwards it was argued for the defendant, That this case differs from all cases of by-laws made by other corporations, in this, That we shall presume *primo intuitu*, that this by-law is good, until it shall be found upon examination defective, because it is not a by-law made by a private company for managing their particular affairs. Nor 2^{dly}, by a corporation made up and consisting of a small number of men. Nor 3^{dly}, by men obscurely educated and skilful only in trade and not in laws.

But a by-law made by the body of the great and most famous city of *London*; a city known, where *England* is not; a city which is well skilled not only in trade of all sorts, but in learning likewise.

And by-laws of this nature made by the whole city, are made not only by the lord mayor and aldermen, but also by the common council representing all other the citizens, attended and assisted with the recorder, counsel at law, and very many others learned and well read, not only in the laws of this kingdom, but in all other human learning.

So that he that will suddenly censure such a by-law without well weighing it, and strictly comparing it with the rules, whereby all by-laws are to be examined, will undertake a great task, and with much difficulty (if at all) obtain a justification from knowing men.

- P. 326. • And as *sir Francis Moor* says in his argument of *Dave-
nant* and *Hardie's* case 583. All by-laws are accommodated to
the utility and advantage of the place. And so a by-law made
in *Newcastle* may be good for that place, which may not
serve for *London* or *Norwich*.

So I make no question but that this by-law hath been
found in the main of it, so far as to order the carts and car-
men, a most advantageous law for the city: for, considering
the

Term. Mich. 31 Car. 2. In Cam. Scacc.

the humour of such men, the populousness of the place, the quality of persons there inhabiting, and thither resorting, and the occasions of stopping the streets and lanes, which though much amended of late, yet narrow enough for the passengers, some such law is very fit to prevail in this city.

And the rather for that this is not a trade, but an employment; and therefore where it is objected, that the city may as well restrain brewers, taverns, tallow-chandlers, &c.

I answer, There is not the same reason, for they are trades to which men are bound apprentices, and to take away their trade is to take away their livelihood.

Nor 2dly, That the oversight is committed to another corporation, for I cannot see, why it may not be as well managed by them, nay better than by others.

Object. What if the president will not grant a licence?

Resp. 'Tis not to be presumed when we consider what great trust he is in already, that he should falsify it in so small a matter. 2dly, The same objection may be made to the clerk of the inrolments in *Chancery*, or any officer of any court of justice. And if an action of the case will not lie here, yet an equivalent remedy may be had, for upon an address to the mayor and aldermen there will be provision in such case. So that so far I shall not doubt of the validity of this by-law.

That which sticks with me is, That part of it from whence arises this very controversy, which is, *That 17s. 4d. per annum, and no more, shall be received and paid for a carroom, and 20s. and no more, or greater fine, upon any admittance or alienation of a carroom, which 17s. 4d. per annum, and 20s. aforesaid, is wholly to be applied towards the relief and maintenance of the poor orphans harboured and to be harboured in Christ's hospital; and if he shall work without licence he shall forfeit 13s. 4d.*

In all privileges either by prescription or patent to make by-laws, there is this clause either expressed or implied, that they be *ad utilitatem Regis & Populi, bonæ fidei congrua, & rationi consona, & dummodo non sint in præjudicium populi*, as * we may see in *Waggoner's case*, 8 Co. 121. b. and *Davenant and Hardie's case*, Moor 576. and many others. P. 327.

Now it is said to be *ad utilitatem* of the people when there is *Quid pro Quo*.

8 Co. 125. Sir George Farmer prescribes to have a common bakehouse in *Toucester*, and that all the inhabitants should bake there: but then he lays in his prescription, that
that

Term. Mich. 31 Car. 2. In Cam. Scacc.

that bakehouse was sufficient to bake all the bread for the inhabitants and passengers. So 11 H. 4. 86. b.

Mich. 1657. in *B. R. Intr. Hill.* 1656. *Rot.* 1335. *Allot* versus *Jackson*. An action upon the case for not grinding at his mill, where he prescribes for measure, as sir George Farmer did for his bakehouse; and resolved, he must aver that his mill was sufficient to grind all the corn, and that he was bound so to do; and a case was there cited to be adjudged *Pasch.* 43 *Eliz.* in *B. R. Gooby* versus *Knight*, The case of the town-chandler of *Canterbury*.

Mich. 5 *Jac.* in *B. R. Pincocke* versus *Sanders*. Upon evidence, a custom that the corporation of *Gravesend* have used to maintain a barge for transporting passengers from thence to *London*, and that till that barge be full, none can carry passengers without licence. *Roll. Abr.* 561. pl. 2. 2 *Brownl.* 177. And this is the reason of murage, pontage, toll travers and other tolls.

There are mutual advantages, and the duty is but equivalent to the profit. And so was *Blackwell-Hall's* case, 5 *Co.* 62. b. the penny for hallage was to pay for the labour of the searcher.

And the monies due upon measuring of cloth so far as to answer the charge and the profit of the people was agreed to be good, 11 H. 4. 86. b. though no judgment was therein given.

Now examine whether this be so or no.

1. Here is no compulsion for the carmen; so that my goods may be burnt, and I cannot force a carman to carry them away.

2. Here is 17s. *per annum* and 20s. fine; for what? for the use of the poor of *Christ's-hospital*.

This hath no respect to the overseeing of the carts, the streetmen and others are to be provided for otherwise, and so not like the case of *Blackwell-Hall*. So that I take this to be a pure imposition without regard to the thing in question. And there might have been as well 17l. *per annum*, and 20l. fine as this that is imposed; though perhaps the circumstances of persons be more considered in this. But that will not alter the case.

* P. 328. * And I do not find any by-law of this nature in any place. The case of *Andrew Dевeen* of restriction of brokers hath been cited, but that was to restrain the office, but not to reserve a rent or fine. And though it be said that 40s. *per annum* is now paid, it may not be by that by-law.

I find this case (as hath been cited) 1 *Roll. Abr.* 364. *Payn* versus *Haughton*, there adjudged a monopoly; and yet there

Term. Mich. 31 Car. 2. In Cam. Scacc.

there no rent or fine reserved. As to the case in *C. B. Hutchin's* case, the court was divided.

And afterwards *Termino Hillar*. 31 & 32 Car. 2. adjudged by the whole court, *nemine contradicente*, That the by-law was not good by reason of the fine and rent, but in all things else very good; and so a *Procedendo* was denied. *Vid. 2 Roll. Rcp. 413. Kete versus Michel.*

Bambridge *versus* Bates and others. *Antea* 305.

WALLOP for the plaintiff. This molasses is neither within the words of the act. 2. Nor can it consist with the grounds of philosophy. 3. Nor grounds of law.

As to the first. If the molasses is not at all imported, the necessary consequence will be, that it is not a material imported; but if it was at all imported, it must be either when the sugar was imported, or before, or since; but it could not be when the sugar was imported, being not in *Esse*, but was made of sugar here in *England*, and therefore it could not be made a material here imported.

Suppose there should be a prohibition that no molasses should be imported, and a man imports sugar of which molasses is afterwards made, this should not be within the prohibition.

As to the 2d, Molasses differs essentially from sugar; for what does not partake of the same specifick form differs essentially, but molasses doth not partake of the same specifick form with sugar; *Ergo, &c.*

Now there is in this making of molasses a separation of parts, and consequently a new specifick form, as cheese, butter, &c. are produced by separation of parts, and do specifically differ from milk.

When it appears farther by the verdict, that the English materials are contributory to this prohibition, and it cannot be said, that molasses is the *Faces* of sugar, since *Faces* are only of liquid things, neither can they be compared to the lees of wine; for sugar after twenty years standing would never produce lees. And the verdict does not find that it is made of sugar, but a separation and extraction from it. For the sweetness may arise from the English materials. And suppose corn should be brought from beyond sea, the liquor arising therefrom by extraction would not be an imported material. So rose-water from roses imported.

At

*Trespass.
Postea 337.*

* P. 329.

Term. Mich. 31 Car. 2. In Cam. Scacc.

As to the third, From the grounds of law, molasses cannot be said to be a material imported. 1. Not according to the rule of law, *Forma dat esse*, and *mutata forma mutatur substantia*.

Just. Inst. l. 2.
Tit. 1. § Cum
ex aliena. Min-
sing. 118.

The ancient Roman lawyers before *Justinian*, as to the question of property, had two several sects, viz. one of *Sabinus*, and the other of *Proculus*; but afterwards, it was agreed amongst the civilians, *That in all cases where the new form may be reduced to the former state, the property remains to him who hath the old substance, but otherwise not*. Now here molasses cannot be reduced to sugar again. And with this agrees *Hill. 16 H. 7. 16. pl. 6. Moor 19. pl. 67*. Leather cut into shoes may be retaken, but not wool made into cloth, or milk made into cheese, *Res corruptæ & transformatæ abesse videntur*. A thing arising from the parts is not any of the parts. Here all the materials are not foreign and imported.

As to the value, it is not material, but the quantity is as to the abstraction. Here is no proportion of the molasses found in the verdict in making the low wines.

2. It is not within the act of parliament. There is no such maxim, as *Not to recede from the letter of the act, if consisting with the law*.

The acts of excise discourage foreign trade, and encourage home made manufactures.

2. The acts charge only foreign commodities, or things made beyond sea. The book of rates says, that molasses is a home manufacture.

These acts are penal, and therefore ought to be taken in the plain and not strained sense; and therefore 39 *Eliz. cap. 15*. which takes away clergy from one who takes money, &c. out of an house in the day-time, extends not to an accessory. 1 *Cr. 473. Evans and Finch's case*. So the statute of 1 *Jac.* against *Stabbing* doth not extend to a stabbing, upon a previous restraint of the offender by the party killed, * *P. 330. Buckner's case, * Mich. 1655. B. R.* So the statute of 13 *Eliz. cap. 20*. doth not extend to a covenant to enjoy.

Where a statute mentions particular matters, and afterwards concludes in general words, the general words shall be referred to things of the same nature, as the archbishop of *Canterbury's case*, 2 *Co. Other Means*. So the statute of burglary: So here, *Other Materials* shall be intended materials of the same nature. These general words have a good effect, for new foreign molasses are included. But if this molasses should be included, why not low wines made of grapes or apples imported? *Generalis Clausula non porrigitur*
ad

Term. Mich. 31 Car. 2. In Cam. Scacc.

ad ea quæ generaliter sunt comprehensa, Bonham's case. Wine or cider made here of grapes or apples imported are not within this law, *Qui nimis emungit, elicit sanguinem.* And so I conclude for the plaintiff.

Sawyer contra. This act is not penal, but only to enlarge the king's revenue, and so ought to be expounded liberally.

The verdict finds that molasses is *Fæces* of sugar, and lees of wine cannot be made wine again, so wine made vinegar; but he said little more to the purpose. *Et adjournatur. Vide post.*

John James *versus* William Richardson. *Midd.*

EJECTMENT in a writ of error. The plaintiff declares of the demise of *George Durdant* 10 Octob. 28 Cur. 2. at *Stanes*, of 20 acres of land, 20 acres of meadow and 20 acres of pasture in *Stanes* for five years from *Michaelmas* before. Upon Not guilty pleaded, the jury find a special verdict, viz.

Henry Wicks esquire in his life-time 6 Junii 1657. was seised in his demesne as of fee of the premises in the declaration; and so being seised the same day and year made his last will and testament in writing, and thereby did devise to one *John Higden* and *Joan* his wife, being niece of the said *Henry*, and to the heirs of the body of the said *John* upon the body of the said *Joan* begotten and to be begotten, all his messuages, stables, coach-houses, lands, tenements and hereditaments in *Covent-Garden* and *Vinegar-Yard* in the parish of *St. Martin in the Fields*, and *St. Paul Covent-Garden* in the county of *Middlesex*. And farther the said *Henry Wicks* by the same will devised the said premises in the declaration as follows, viz. *Item, I • give and bequeath unto my cousin John Higden and his heirs, during the life only of Robert Durdant, my kinsman, eldest son of my nephew Andrew Durdant deceased, all those my messuages, lands, tenements and hereditaments in Stanes and Stanwel in the county of Middlesex, upon this trust and confidence, that he the said John Higden and his heirs shall permit and suffer him the said Robert Durdant from time to time, during the time of his life, to have, receive and take the rents and profits thereof, which shall yearly grow due and payable for the said last mentioned premises, He the said Robert committing no waste upon the same, and so as he the said Robert Durdant after my decease, and within one month after request to be made to him, shall make and execute*

Devise.

2 Danv. Ab.

515. p. 7.

Eq. Ab. 214.

p. 11.

1 Vent. 334.

2 Vent. 311.

2 Lev. 232.

2 Jones 99.

Pollexf. 457.

Carth. 154.

Skin. 205.

3 Keb. 832.

Comb. 153.

P. 331.

execute to the said *John Higden* and his wife, and the heirs between them, as aforesaid, such good and sufficient release, conveyance and assurance in law of the said messuages, lands and premisses by me to them devised, as aforesaid, in *St. Martins in the Fields*, and *St. Paul Covent-Garden*, as to them or any of them, their or any of their counsel learned in the law shall be reasonably devised or advised and required, to the end that he the said *John Higden* and his wife, and their children, may enjoy the same free from the claim of the said *Robert Durdant*; and from and after the decease of the said *Robert Durdant*, Then I do give and devise the said last mentioned lands and premisses in *Stanes* and *Stanwel* unto the heirs males of the body of him the said *Robert Durdant*, now living, and to such other heirs male or female, as he shall hereafter happen to have of his body. And for want of such heirs, then to the use and behoof of my cousin *Gideon Durdant*, and the heirs of his body; and for want of such heirs, the same to be and remain to the right heirs of me the said *Henry Wicks*.

The said *Henry Wicks* died seised; *George Durdant* lessor of the plaintiff, at the time of the making of the said will, and at the death of the said *Henry Wicks* was the only son and heir male apparent of the said *Robert Durdant* of the body of the said *Robert Durdant* begotten. And the said *Robert* never had any son besides the said *George*. And that the said *George* was the godson and nephew of the said *Henry Wicks* the devisor.

After the death of the said *Henry Wicks*, the devisor, the said *John Higden* by virtue of the said devise entered into the said premisses contained in the said declaration, and became seised thereof in his demesne as of freehold, for the

* P. 332. * life of the said *Robert Durdant*. He so being thereof seised 26 Martii 14 Car. 2. in consideration of 36*l.* paid to him and the said *Robert Durdant* by one *Abraham Spore*, he did infeoff the said *Abraham Spore* and his heirs, to the use of the said *Abraham* and his heirs, and in Easter Term 14 Car. 2. levied a fine without proclamations with warranty against him and his heirs; and *Robert Durdant* joined in the said fine with like warranty. That the said fine was to the use of the said *Abraham Spore* and his heirs, by virtue of which said feoffment and fine the said *Abraham Spore* became seised in his demesne as of fee, prout *lex postulat*; and being so seised 9 Julii 14 Car. 2. by his indenture then dated and made between him of the one part, and the said *William Richardson* of the other part, The said *Abraham Spore* for 5*l.* demised the premisses for six months to the

said

Term. Mich. 31 Car. 2. In Cam. Scaec.

said *William Richardson*, and by an indenture dated the day following, released to him the said *William Richardson* and his heirs to the use of him and his heirs for a competent sum of money. By virtue whereof the said *William Richardson* became seised in fee, *prout lex postulat.* 1 Maii 20 Car. 2. *Robert Durdant* died, and that at the time of his death the said *George Durdant* was under age, viz. but 15 years old. That 1 Octob. 28 Car. 2. *George Durdant*, lessor of the plaintiff, entered upon the possession of the said *William Richardson*, and made the lease to the plaintiff.

Judgment in
B. R. was
given by three
against one.

And if for the plaintiff, for the plaintiff, &c.

Judgment was given in B. R. for the plaintiff, and now the defendant brings a writ of error.

Saunders for the plaintiff in the writ of error. The case upon the record, as to our purpose, is no more but this: *Henry Wicks* being seised in fee devises to *John Higden* and his heirs, during the life of *Robert Durdant*, the remainder to the heirs male of *Robert Durdant* now living. And the question is, Whether *George Durdant*, the only son of the said *Robert*, shall take in remainder during the life of his father? And I hold that this remainder is a contingent remainder, and not vested during the life of his father. The words (*Now living*) would have a description of the person, as the statute of 25 E. 3. cap. 2. *Of Treason*, 'To kill the king, queen, or their eldest son and heir.

Resp. It is not treason to conspire the death of their heir, but eldest son.

Object. *Quare Filium & Hæredem rapuit.*

* *Resp.* If the writ were now to be framed, it would be * P. 333. otherwise; but there is a description of the person, but no person is described only by the name of heir, but some addition is made to it, for *Non est hæres viventis.*

Object. Heirs male now living.

Resp. *Now living* shall not be referred to heirs male, because there can be no such person during the life of *Robert*, but *Now living* shall be referred to *Robert* as *Proximus antecedens.* Poph. 21.

But admit that heirs male now living should be a description of the person, yet here is no such person capable to take in the life of the father. If this were a remainder vested, it should be either by legal construction, or because wills are favoured in law.

Object. The words here shew the intent of the testator.

Resp. This construction cannot consist with the intention of the testator, for he did not intend that *George* should have

Term. Mich. 31 Car. 2; In Cam. Scacc:

have an estate during the life of his father, or for life only. And the word *heir* may be intended the description of a person, but not when it is in the plural number. And if *George* shall take here by remainder vested, he shall take only for life, which was never intended. On the other side, the whole will is sensibly penned; for there is a devise to *Higden* during the life of *Robert Durdant*, remainder to the heirs of him, which shews his intent, that his heirs shall take as purchasers. And this construction agrees with *Littleton*, sect. 30. where an estate is limited to the heirs of the body of the father, it is an estate-tail, and the word *heirs* makes an inheritance, *Co. Lit.* 9. but *heir* makes but an estate for life. 1 *Co.* 63. *Archer's case*, 1 *Roll. Abr.* 832. Devise to a feme and her heir, 2 *Cr.* 313. *Moor* 593. *Clark versus Day*, 2 *Roll. Abr.* 253. *Paufe versus Lowdal*.

Object. What estate shall the heirs of *Robert* have?

Resp. *Heir* in the singular number doth not make an inheritance, and here is no limitation to the females.

George cannot take as heir in the life of his father, for what if his father were attainted of felony or treason, *George* could never take.

* P. 334.

The reason of the reversal, was for that the estate limited to *Robert Durdant* was an estate for life in the lands executed by the statute of 27 H. 8. Of Uses, and then he being tenant in tail, his fine barred the estate-tail.

Now living shall be construed to such as shall be heir to *Robert Durdant*, and now living, *Vide Archer's case*, and *Hob.* 29. *Couderi versus Clark*, and 2 *Leon.* 70. *Challoner versus Bowyer*.

* And to construe this will otherwise is to remove an ancient land-mark of the law, which is, that when the ancestor takes an estate for life, the word *heirs* is a word of limitation, but otherwise, it is a word of purchase. Ad-journed, and *Hill.* 31 & 32 Car. 2. Judgment was reversed, *nemine contradicente præter Atkins Justice del Common Bank.*

The Commissioners of Delegates at Serjeants-Inn.
Decemb. 9. 1679.

Will.

GEORGE STONYWEL 2 Septemb. 1679. makes his will in writing and makes *Elizabeth*, his wife, his executrix, and gives all the *residuum* of his estate, after some legacies paid, to her; *Elizabeth* dies in his life-time, viz. 5 Septemb. 1679. and *George* the testator, having notice of the death of his wife, makes a nuncupative codicil dated 6 Septemb. 1679. and gives to *George Robinson* all which he had given to his wife, and dies 13 Septemb. 1679. and the single question was, Whether this nuncupative codicil be allowable

Term. Mich. 31 Car. 2. In Cam. Scacc.

allowable notwithstanding the statute of *Frauds* and *Perjuries*, 29 Car. 2. The words whereof are, *That no will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise or bequest therein be altered or changed by any words, or will by word of mouth only, except the same be in life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.* And resolved by sir Hugh Wyndham justice, myself and several civilians joined with us in the commission, That as this case is, the nuncupative codicil is good; for by the death of *Elizabeth* before the testator, the devise of *Residuum* became totally void, and so there was no will, *quatenus* as to that part. And so the nuncupative codicil was *quasi* a new will for so much, and was no alteration of the will as to so much, because there was no such will, its operation being determined.

And whereas it was objected, that by the same reason, if any part of a will in writing shall be made by force or fraud, the thing so given and specified in such part may be devised by a nuncupative codicil, and so the will altered contrary to the words of the statute. We answered, that if such part of a will were so obtained, it was no part of the will, and so * such codicil would be no alteration of what * P. 335. was not; but would be an original will for so much. So if *A.* be possessed of an estate of 1000*l.* and by will in writing gives 500*l.* of it to *B.* he may give the residue by a nuncupative will, so as he do not alter the executor.

Pawlet's Case.

AMOS PAWLET 2 Feb. 1649. makes his will in writing, and gives a legacy to his niece, in these words: *I do ordain and give to my dear niece Florence Roll second daughter of my brother Denis Roll esquire, the sum of 500*l.* which my sister, the lady Cholmeley hath now in her hands of mine, as by her bond made to me and my heirs appears: and makes no executor, and dies in Octob. 1669.* About ten years before his death the lady *Cholmeley* paid to him the 500*l.* and whether this legacy is due is the question; and we resolved, that the legacy was due, though the security was altered; because it is a pure legacy, neither *Legatum Nominis* nor *Legatum Debiti*; and the words are only to shew that he meant the legacy should be as certain to her as he could make it. And the counsel for the legatee

Term. Mich. 31 Car. 2. In Cam. Scacc.

legatee cited *Digest. de legatis quidam Testament.* 96. and also *Theobal* and *Wynn's* case lately adjudged, where a devise was of a legacy out of debts due in several counties, and they were called in before the testator's death, and yet the legacy remained good. And *Hill.* 1671. *Squib versus Chickely*, where the lady *Verney* gave legacies out of monies then out at interest, and called in before the testator's death. And a difference was taken between a legacy *in numerat.* and a specifick legacy; for in the first case the legacy will remain, though the debt *ex quo* be paid in; but the specifick legacy may be lost by being altered. *Vide Godb.* 91. *Johnson's* case.

Evidence.

Nota; At a commission of review in the case between *Bray* and *Whitelage* concerning the will of Mr. *George Bray* of *Lincoln's Inn*, who gave thereby all his estate to a woman he kept, and made her his sole executrix, and waived his only brother, Mr. *Lodowick Bray*. It was said by justice *Ellys*, that it was resolved by the whole court of *B. R.* in the case of *Dutton* upon a trial at bar concerning his will forged by Mr. *Colt*, * That depositions taken in *Chancery in perpetuam rei memoriam* upon a bill for that purpose exhibited, cannot be given in evidence at a trial at law, unless there be an answer put in and produced; and so he said, he hath known it several times resolved both in *B. R.* and *C. B.*

* P. 336.

Ekins versus Smith. In the Exchequer.

Trover.

ADJUDGED by the whole court, That if goods be condemned by the court, and proclaimed as forfeited, the property is altered, so as no action of trespass or trover will lie by the proprietor against the person that seizeth them.

Term.

* Term. Hill. 31 & 32 Car. 2. * P. 337.

In the Exchequer.

Bambridge *versus* Bates & al. *Antea* 305, 328.

LETCHMERE for the plaintiff. Here is not any special conclusion by the jury, *viz.* Whether the low wines are made of foreign materials? But as this record is, 1. Here is no colour for the court to give judgment for the defendant. 2. Here is colour to give judgment for the plaintiff. 1. For that they find that the jury find that the plaintiff was *communis Distillator aquarum fortium* for a year before; but they do not find that he made low wines of foreign materials, and so that which they find is a thing immaterial. 2. They find that *Hall* did exhibit an information; and the plea and judgment, *prout per Recordum apparet*, but do not find that the contents of that information were true. 3. They find that there is molasses made beyond sea, and also in *England*; but they do not find who made them. 4. They find that molasses is made *ex facibus Saccari*, but they do not find that the plaintiff made the low wines *ex facibus Saccari*. Trespas.

And for this very cause in *Terry and Huntington's* case it was adjudged naught, in *Hill. 1668.* in this court. Vide Palmer
192. Langley
versus Payn.

In the case of bankrupts, although the commissioners have sole authority to adjudge a man bankrupt, yet in an action the jury must find whether he was a bankrupt or no, and not barely by the adjudication of the commissioners.

'Tis so in case of a plea, 2 *Roll. Rep.* 40. In an avowry for an amerciament in a leet, it is not sufficient to say *presentatum fuit* at the leet, that the plaintiff did such an act, but he must aver the thing, and not rely upon the presentment.

2. Here is ground to give judgment for the plaintiff, because it is expressly found that the defendant took away his goods.

* The first act which gave liberty to a defendant to plead * P. 338.
the general issue was 7 *Jac. c.* 5. for by the common law every

Term. Hill. 31 & 32 Car. 2. In Scacc.

every man was bound to plead duly, and not to justify by virtue thereof after he had pleaded not guilty; but that is, that he may give such special matter in evidence, as being pleaded, had been a good and sufficient matter in law to have discharged the defendant of the trespass or other matter laid to his charge, and so he would have given every thing in evidence,

And the statute of 23 H. 8. cap. 5. concerning sewers, says, That in an avowry the avowant may justify the taking, &c. by virtue of the commission of sewers, without alledging the matter specially.

But in this case at bar, upon the general issue pleaded, the special matter cannot be given in evidence; for though by the act of 12 Car. 2. that act may be given in evidence, and so 22 Car. 2. yet it is not said so in the act of 29 Car. 2.

Memorandum, The 7th day of February I was made judge of the Common Bench 1679. 32 Car. 2.

Memorandum, The 29th day of April I was made judge of the King's Bench 1680. 32 Car. 2.

Robert Murrey Gent. Plaintiff, *versus* Dorothy Eyton Widow, and Roger Price, Defendants.

In Trespass and Ejectment. Intr. Hill. 29 & 30 Car. 2.
In Officio Placitorum.

Estate.

2 Jones 237.

Pollexf. 491.

Skin. 95.

2 Show. 104.

Antea 260,

286, 319.

THE plaintiff declares of the demise of William George-Richard earl of Derby made 2 May 29 Car. 2. of one messuage, three water-grist mills, ten acres of land, ten acres of meadow, and fifteen acres of pasture in the parish of Hope alias *Queenhope* for five years, from the first day of the said month of May. Upon Not guilty pleaded, the jury find a special verdict, viz.

That long before the trespass and ejectment, king Richard the third was seised of the manor of Hope in his demesne as of fee in right of his crown, of which the tenements are parcel.

* P. 339. * That the said king being so seised 17 September 2 R. 3. by his letters patent under his great seal of England, granted the said manor and tenements (*inter alia*) to sir Thomas Stanley knight, lord Stanley, and afterwards earl of Derby, and sir George Stanley knight, lord Lestrangle son and heir apparent of the said Thomas lord Stanley, and the heirs male

Term. Hill. 31 & 32 Car. 2. In Scacc.

male of the body of the said *Thomas* lord *Stanley* for ever,
by knights service, and 50*l.* per annum.

The words of which letters patent begin thus :

Cum non solum generis Nobilitas, sed & justitiæ æquitas Letters Patent.
omnes provocent, & maxime Reges & Principes, homines
de se bene meritos præmiis condignis afficere, Sciatis igitur;
quod ob singulare & fidele servitium quod dilecti nostri
- *Thomas Stanley Miles Dominus Stanley & Georgius Stanley*
Miles Dominus Lestrange filius dicti *Thomæ* nobis præan-
tea impender' non solum favendo Juri & titulo nostro, cu-
jus Juris & tituli vigore jam nuper ad Coronam hujus
Regni nostri Angliæ Domino adjuvante pervenimus, verum-
etiam reprimendo proditones & militias Rebell. & prodit-
orum nostrorum qui infra idem Regnum nostrum perfidam
jamdudum commotionem suscitaverant ac pro bono & fideli
servitio nobis & hæredibus nostris Regibus Angliæ per
eisdem *Thomam & Georgium & hæred. suos* pro defen-
sione nostra & Regni nostri præd. contra quoscunq; prodit-
ores inimicos & rebelles quoties futuris temporibus opus
erit impendend. De gratia nostra speciali dedimus & con-
cessimus, &c.

That by virtue thereof the said *Thomas* and *George* did
enter, and were thereof seised to them and the heirs male
of the body of *Thomas*.

That *George* had issue *Thomas*, afterwards earl of *Derby*,
and died in the life of the said earl his father.

1 June 19 H. 7. *Thomas* the father died seised, by reason
whereof *Thomas* the grandson became seised in tail.

The said *Thomas* had issue *Edward*, afterwards earl of
Derby.

1 August 13 H. 8. *Thomas* last mentioned died seised, and
Edward became seised; *Edward* had issue *Henry*, after-
wards earl of *Derby*.

24 October 14 Eliz. *Edward* died seised, and *Henry* be-
came seised.

* *Henry* had issue *Ferdinando*, afterwards earl of *Derby*, * P. 340.
and *William Stanley* his second son afterwards likewise earl
of *Derby*.

25 September 35 Eliz. *Henry* died seised.

Ferdinando entered, and had no issue male but only three
daughters, viz. *Anne*, *Frances* and *Elizabeth*.

16 April 37 Eliz. *Ferdinando* died seised in the life of his
brother *William*, and so the premisses descended to him, who
entered.

That

Term. Hill. 31 & 32 Car. 2. In Scacc.

That after the death of *Ferdinando*, an act of parliament
4 Jac. was made for determining differences as followeth,
viz.

In most humble manner beseeching your royal majesty,
your highness loyal, faithful and obedient subjects, *William*
earl of *Derby* of the most noble order of the garter, knight,
Henry earl of *Huntingdon*, and the countess *Elizabeth* his
wife, *Gray Bridges*, lord *Chandos*, and the lady *Anne* his
wife, eldest daughter of *Ferdinando* late earl of *Derby*, sir
John Egerton knight, son and heir male apparent of the
right honourable *Thomas* lord *Ellesmere*, lord chancellor of
England, and the lady *Frances* his wife, which said *William*
earl of *Derby* is brother and heir male, and the said ladies
Anne, *Frances* and *Elizabeth* are daughters and co-heirs of
the said *Ferdinando* late earl of *Derby*, who died without
issue male of his body.

That whereas after the death of the said earl *Ferdinand*
divers variances, suits and controversies did arise and grow
between your said subjects *William* earl of *Derby*, and the
said ladies, as well touching the estate, right and title of, in
and to the honours, castles, manors, lands, tenements and
hereditaments of the said earl, as also touching the filial
portions and advancements of and for your said subjects, the
said ladies *Anne*, *Frances* and *Elizabeth*; for appeasing, end-
ing and determining of which said variances, suits and con-
troversies, the said *William* earl of *Derby*, and other issues
males of the said honourable house of *Derby*, as also the
said ladies, before any their inter-marriages, by and with
the advice and consent of the right honourable *Alice* coun-
tess dowager of *Derby*, late wife of the said *Ferdinand*, and
mother of the said ladies, and by and with the advice of
other their honourable friends, and of their counsel learned,
and officers, did submit themselves to the arbitrement, order
and judgment of the right honourable *Thomas* lord *Buckhurst*,
lord high treasurer of *England*, and now earl of *Dorset*,
* P. 341. * and of the right honourable *Guibert* earl of *Shrewsbury*,
the right honourable *George* earl of *Cumberland* deceased,
George lord *Hunsdon* deceased, and of the right honourable
sir *Robert Cecil* knight, principal secretary to your highness,
and now earl of *Salisbury*, being the honourable well af-
fected friends, as well of the said *William* earl of *Derby*,
and other the issues male descended of that honourable house,
as of the said ladies heirs general, which said honourable
persons are elected to end the said controversies, having deli-
berately heard the said parties and their learned counsel and
officers,

Term. Hill. 31 & 32 Car. 2. In Scacc.

officers, and such other their loving friends as were authorized to deal therein; and having advisedly heard and considered of their several rights, titles and claims, did by the consent and agreement of all the said parties and their counsel, officers and friends, for the appeasing, ending and extinguishment of all variances, claims, titles and controversies then moved and grown, and which then after might arise and grow between the said parties, or any of them touching the premises, agree, order and determine (amongst other things) That such and so many of the said castles, manors, lands, tenements and hereditaments late parcel of the possessions and hereditaments of the said *Ferdinand*, late earl of *Derby* in the towns, hamlets, villages hereafter mentioned, and in every or any of them, should be assigned, conveyed and enjoyed unto, and by such person and persons, and of, for and during such estate and estates, and with and under such limitations, powers, liberties, declarations and savings, and in such manner and form as hereafter is mentioned, limited and expressed; with which said order and agreement so made by the honourable persons, as well the said *William* earl of *Derby*, and the countess *Elizabeth* his wife, and the rest of the issues male descended from that honourable house of *Derby*, as also the said honourable lady *Alice* countess dowager of *Derby*, and the said ladies *Elizabeth*, *Anne* and *Frances* daughters to the said late earl *Ferdinand*, before and until their several marriages, their said husbands, and they did, and yet do hold themselves well contented and satisfied.

May it therefore please your most excellent majesty, That it may be enacted, and be it enacted by your majesty, the lords spiritual and temporal, and the commons in this present parliament assembled, and by the authority of the same, That all and every the castles, manors, lands, &c. late the possession and inheritance of the said *Ferdinand* late earl of * *Derby*, in the towns, hamlets, villages and places hereafter mentioned, shall be from henceforth for ever assured and enjoyed unto, and by the persons hereafter named of and for such estates and limitations, and with and under such powers, liberties, provisoes, exceptions, declarations and savings as afterwards expressed, and that the actual and real possession of all and singular the said castles, manors, lands, &c. shall be by authority of this present act, immediately from henceforth vested, &c. in the persons hereafter named in possession, remainder and reversion respectively for such estates,

* P. 342.

Term. Hill. 31 & 32 Car. 2. In Scacc.

estates, and with and under such powers and savings as is hereafter expressed.

And afterwards in the same act concerning the manor of *Hope*, it is enacted,

That the said *Alice* countess dowager of *Derby* during her life, and after her decease, the said *William* earl of *Derby* during his life, and after his decease, *James* son and heir apparent of the said *William* earl of *Derby*, and the heirs male of his body, and in default of such issue, the second, third, fourth, fifth, sixth and seventh sons of the said *William* earl of *Derby* lawfully begotten, and the heirs male of their and every of their several bodies, lawfully begotten, successively and respectively, according to the priority of their birth and age, one after another; and in default of such issue, sir *Edward Stanley*, knight, during his natural life, and after his decease the first, second, third, fourth, fifth, sixth and seventh sons of the said sir *Edward Stanley*, and the heirs male of their several bodies successively; and in default of such issue, *Edward Stanley* of *Bickerstaff* esq; during his life, and after his decease the first, second, third, fourth, fifth, sixth and seventh sons of the said *Edward Stanley* and the heirs male of their bodies, severally and successively, and so *James Stanley* (brother of the said *Edward*) and his seven sons, shall and may have, hold and peaceably and quietly enjoy the said manor of *Hope*, and all hereditaments in the parish of *Hope*.

And that the said *William* earl of *Derby*, sir *Edward Stanley*, *Edward* and *James Stanley* successively in possession to make leases for twenty-one years or under, or for one, two or three lives, or for any number of years determinable upon one, two or three lives, in possession, and not in reversion, reserving the old and accustomed rent.

A power for them to make jointures not exceeding a third part.

* P. 343.

There is another act 7 Jac. to explain this proviso.

* Provided always, and be it enacted and declared by the authority aforesaid, That your most excellent majesty, your heirs and successors, and all and every other person and persons, bodies politick and corporate, their heirs and successors, executors, administrators and assigns, and every of them, other than the persons to whom any estate or estates are before limited or mentioned to be limited by this present act, and their heirs, shall have, hold and enjoy all and every such and the same estate and estates, lease and leases, rights, titles, interests, reversions, repts, annuities, pensions, services, tenures, primer-feisins, liveries, actions, statutes, bonds, recognizances, debts, executions, judgments,

Term. Hill. 31 & 32 Car. 2. In Scacc.

ments, entries, conditions, covenants, warranties, uses, possessions, offices, commons, liberties, easements, profits, commodities, emoluments, claims and demands as your highness, your heirs and successors, or any of them, or any other person or persons, bodies politick or corporate, their heirs, successors, executors, administrators or assigns, other than the persons before excepted to whom any estate or estates is before limited by this act, now lawfully have, or hereafter shall or may lawfully have or claim of, into, out of, or for any the said castles, manors, lands, &c. in such and the same manner and form, to all intents, constructions and purposes, as if this present act had never been had or made.

That *Alice* countess of *Derby* was widow and relict of the said earl *Ferdinand*.

That the said sir *Edward Stanley* knight, at the making of the said act, was a person who ought to have the said lands after the death of the said *James*, son of the said *William* earl of *Derby*, without issue male of his body, by virtue of the said letters patent.

That the said *Edward Stanley* of *Bickerstaff*, was next to take after the issue male of the said sir *Edward*.

That the said *James* was next after his brother *Edward* and his issue.

1 May 1636. *Alice* died.

Earl *William* entered and was seised prout *Lex*.

29 September 1642. earl *William* died seised, and *James* his son entered and became seised prout *Lex*.

The said earl *James* had issue *Charles*, afterwards earl of *Derby*.

15 October 1651. earl *James* died seised, and earl *Charles* entered.

* 14 February 1653. the said earl *Charles* and *Dorothea* * P. 344.
Helena his wife, by indenture tripartite between them of the first part, sir *Charles Woolesty*, *Richard Knightley*, *John Twisleton*, *John Hewley*, *Rowland Jewkes* and *Joshua Sprig* of the second part, and *Thomas Crachley*, *Nicholas Brereton* and *Roger Griffith* of the third part, for 1700*l.* to the said earl, and 1898*l.* 10*s.* to the trustees for selling the said estate by the parliament, paid by the said earl's appointment, grant the said manor of *Hope* to the said sir *Charles Woolesty*, *Richard Knightley*, *John Twisleton*, *John Hewley*, *Rowland Jewkes* and *Joshua Sprig*, and their heirs, with warranty against the said earl and his heirs, executed by livery.

10 April 1654. the said earl and his wife levied a fine at
the

Term. Hill. 31 & 32 Car. 2. In Scacc.

the great sessions, with a general warranty to the uses in the indenture.

That the grantees entered and continued in possession from the time of the making the said indenture, and that the defendants are still tenants to the grantees.

21 December 1672. earl Charles died, leaving issue the lessor of the plaintiff, then of the age of sixteen years, nine months and four days, and no more.

2 February 29 Car. 2. earl William-George-Richard made the lease *prout*.

They find the statute of 34 H. 8. cap. 20. and conclude generally.

Before I come to the main points of the case, I shall only mention what hath been, or (at least) ought to be allowed on both sides, viz.

Consideration.

1. That the consideration paid for this land by the feoffees of Charles earl of Derby is not material one way or other.

Reversion in Crown.

2. The reversion continues in the crown, notwithstanding the fine, feoffment or act of parliament.

4 Jac.

3. If this act of 4 Jac. had not been made, the first estate-tail could not have been barred.

Discontinuance, Lit. sect. 625.

4. If the estate-tail is not barred, neither the feoffment nor fine made any discontinuance; for Littleton says, sect. 625. That none can discontinue an estate-tail, unless he discontinue the reversion; and therefore if the tenant in tail infeoff the donor, it is no discontinuance of the entail.

Warranty.

* P. 345. 5. The warranty contained in the fine of 1654, doth no prejudice to the estate of the issue of Charles, because 'tis a lineal warranty, and there is no assets found.

These things being premised, there are but two points to be spoke unto.

1. What effect the fine in 1654. hath, taking it abstractively from the statute of 34 H. 8. cap. 20.

2. What influence the statute of 34 H. 8. hath in this case.

1 Point.

As to the first. The case is no more but this, tenant in tail, the reversion in the crown, after the statute of 4 H. 7. cap. 24. and before 34 H. 8. levies a *Fine come ceo*, &c. with proclamations, and hath issue and dies, Whether his issue be by this fine barred?

And as to this point, I do conceive, that if the statute of 4 H. 7. will not enable the operation of the fine to bar the

Term. Hill. 31 & 32 Car. 2. In Scacc.

the issues, the statute of 32 H. 8. cap. 36. will not, because *Proviso in* there is a proviso in that statute, that the same shall not ^{32 H. 8.} extend to fines levied of lands granted to the conusor or his ancestors in tail, by letters patent from the crown, the reversion whereof at the time of the levying the said fine being in the crown; but that every such fine shall be of like force as they were or should have been, if the said act had never been had or made.

So that now I must consider what power tenant in tail had to bar his issues by the statute of 4 H. 7.

And I am of opinion, that the issues were not barred by such fine, by the statute of 4 H. 7.

To prove this, 1. It will not be denied, but that a fine levied before 4 H. 7. would not have barred the issues. It would have been a discontinuance, but not a bar. *Ipso jure fit nullus*, viz. it shall not bind the right, but prevent the entry. Co. 2 Inst. 336. For the statute of Westm. 2. de Co. 2 Inst. donis, reciting the form of fees-simple conditional, which ^{336.} are now estates-tail; and the mischiefs, that the feoffees after issue had power to alien, and to disinherit the issues, and to prevent the possibility of reverter to the donor, which was totally against the intent, and therefore *durum videbatur, i. e. iniquum*, says the lord Hob. 336. That statute ordains, *quod non habeant illi, quibus tenementum sic fuerit datum, potestatem alienandi*; and that if any fine shall be levied, *ipso jure fit nullus*. The matter mentioned in this statute was so * plausible, that it wrought much upon the minds of * P. 346. men, inasmuch as they were so far from finding out of ways to alien, that they thought themselves bound in conscience, as well as by the words of the statute, not to alien, as we may see in Doctor & Student in his first book. And Little- Dr. & Stud. ton says, 362. That a condition to restrain tenant in tail l. 1. from aliening farther than for his own life, is good; for Lit. sect. 362, that such farther alienation amounting to a discontinuance is 563. contrary to good right, sect. 363. And though the project of justice Rickil in the time of R. 2. and of Thirning in the time of H. 5. took no effect, yet afterwards many conveyances to uses to make perpetuities were contrived, and never judicially examined till the time of queen Elizabeth.

About five years after, viz. 18 E. 1. was the stat. of *Modus levandi Fines* made, which says, That a fine levied shall bar parties and privies, by which word, *Privies*, is meant only privies in blood, and not privies in estate, says the lord Coke 2 Inst. 516. And whereas the words of that Co. 2 Inst. act are, *And all other people of the world*, yet do they not ^{516, 517.} abrogate the statute of Westm. 2. which provided for pre-
servation

Term. Hill. 31 & 32 Car. 2. In Scacc.

servation of estates-tail, fol. 517. And the issue in tail claims not from his ancestor in privity of blood or estate, but *per formam doni*, and therefore not concerned in such fine, unless by estoppel, so as not to plead *qd partes finis nihil habuerunt*. For before 26 H. 8. though tenant in tail were attainted of treason, his issue should inherit, for the legal blood was not corrupted. And Littleton says, That if tenant in tail infeoff his son within age and die, the issue in tail shall be remitted, being (as the lord Hobart says, fol. 71.) a kind of third person, by the intent of the statute of Westm. 2. though Fitz. Remitter 13. be of a contrary opinion.

Hob. 71.

F. Remitter
13.

The statute of 27 E. 1. *de Finibus levatis* doth take away the heir, either in fee or tail from pleading *quod partes Finis nihil habuer'*. But that was not in respect of the estate-tail; but by reason of the natural blood between the heir and ancestor; and 'twas only in respect to fines, that they should be an estoppel to such pleas.

Then the statute of non-claim 34 E. 3. cap. 16. reaches not to issues in tail, because they were not concerned in claims.

Then comes the statute of 4 H. 7. which says, That after the ingrossing of every fine to be levied in C. B. of any lands, the same shall be openly and solemnly read and proclaimed; and the same to be a final end, and conclude privies and strangers.

* P. 347. * Now no reason appears why privies in 4 H. 7. shall include issues in tail, more than in 18 E. 1.

As to the objection, That if it had not been for the saving, all estates-tail, remainders, and all others had been barred; I answer, I cannot see any more reason for that, than why estates-tail should not be within the statute of *Præmunire*; the words whereof are, *That all the lands shall be forfeited to the king*. And yet in *Trudgin's case*, Pasch.

Co. 3 Inst. 126. 21 Eliz. Co. 3 Inst. 126. It was resolved, That tenant in tail shall forfeit only during his life; for, by the word *forfeit*, shall be intended only such lands as he may lawfully forfeit; so here, a fine levied of lands, i. e. of such lands of which a fine might by law be levied; but of lands intailed, the fine *ipso jure sit nullus*, says, Westm. 2. And the court ought not before the statute of 4 H. 7. to take a fine of tenant in tail, Mich. 22 E. 3. 18. b. pl. 84. And if there was tenant in tail, in reversion expectant upon an estate for life, tenant for life ought not in a *Quid juris clamat* to attorn; for 'twas a good plea, that the conusor was tenant in tail. Trin. 2 E. 3. 23. pl. 8. Trin. 37 H. 6. 33. a. pl. 19. Mich.

Mich. 22 E. 3.
18. b. pl. 84.

Term. Hill. 31 & 32 Car. 2. In Scacc.

Mich. 2 E. 2. Fitz. Age 77. 1 Roll Abr. 188. B. pl. 16.
Mich. 48. E. 3. 23. 4. pl. 7. Co. Lit. 318. a. and 3 Co:
86. 4.

The lord *Hobart* in his argument of *Mackwilliam's* case, says, that there was a great fight between intails and fines: how far fines had operation upon them, was very doubtful, *Jones 39.* And the very statute of 32 H. 8. says, that by diversity of interpretation and expounding of 4 H. 7. it had been and then was doubted, and called in question, whether fines levied according to 4 H. 7. by tenant in tail, should bind the issues, and by reason thereof divers debates, controversies, suits and troubles were begun and moved; and very certainly so it was; for *Pasch 19 H. 8. 6. pl. 5. Dyer 2. b.* the very point came in question, and before all the justices at *Serjeants-Inn*, there were three one way, and five the other; and *Brook* was one of the five who held that the fine should bar. And yet he himself in his abridgment, *Tit. Assurances 6. & Fines de Terres 121.* seems to be of opinion, that such fine did not bar; for he says, that if tenant in tail, the reversion in the crown, levies a fine with proclamations, the issues are barred by 32 H. 8. Now that statute left the validity of the fine to what it was before. But *Br. Tail 41.* is, that a recovery barred the issues before 34 H. 8. as the lord *Coke* cites *Brook, Co. Lit. 372. b.* and says it was so adjudged 28 H. 8. But the book in *Brook's Abridgment* names * no time; by which it appears that the lord *Brook* had retracted his opinion, or the reporter was mistaken. And as *Dr. Pollexfen* well observed, *Brook* was made chief justice of C. B. 2 Mar. and was either a judge, or at the height of his practice in 38 H. 8. about which time he was of the opinion cited by the lord *Coke*, and he lived near the making of the statute of 32 H. 8. and so might better know the construction of it. His abridgment was published 16 Eliz. after his death, *Co. Epist. ad 9 Rep.* He likewise cites *Dyer 52.* but there is no such case; and he cites *Plowd. 555.* and 'tis very true that *Manwood arguendo* says as much.

My lord *Coke* says likewise in the same place; and in 2 *Inst. 516* and 517. That if tenant in tail after 4 H. 7. had levied a fine, by virtue of that statute, and 32 H. 8. it had barred his issues; and so doth the lord *Hobart* in the argument of *Mackwilliam's* case 332. but not 4 H. 7. alone; and *fol. 346.* he seems that alone could not do it; so that when I read their books I cannot but give very great reverence to them; but I must acknowledge myself unable to understand

19 H. 8. 6.
Dyer 2. b.

Br. Ass. 6. and
Fines de Ter-
res 121.

Br. Tail 41.
Co. Lit. 372.

* P. 348.

This could not
be the same
Brook in 19
H. 8. but ano-
ther I think.

Dyer 32 pl. 1.

Term. Hill. 31 & 32 Car. 2. In Scacc.

understand them, or how the law came to be so, and therefore I leave them to their own opinions with all due respect.

Object. The lord *Hobart* 332. cites *Pasch.* 28. H. 8. That a fine by tenant in tail, the reversion in the crown, bound the issues by 4 H. 7.

Resp. The very case intended by the lord *Hobart* as is most probable, because of the same term and year as in *Dyer* 31. a. pl. 1. And there the question was demanded of the justices of C. B. by *Say* a counsellor of *Lincolns-Inn*, upon what occasion it appears not. So it may be extrajudicially, and for his own satisfaction, without any cause depending; but here the justices seemed to hold that the issue were barred; and *Inglefield* said he knew it by experience, but *Shelley* doubted, and so there was judge against judge.

I will not mention the lord *Stafford's* case, 8 Co. 74. a. and 6 Co. 55. a. Seignior *Chandos's* case, which have been cited at the bar, that such fine will not bar, because those cases were after 34 H. 8.

He was a Practicer in Trin.
27 H. 8 as appears in Trin.
27 H. 8. 22. pl. 14.

But I think Dr. *Denbhal*, who read upon 4 H. 7. a very great while ago, may be cited, who holds that tenant in tail is out of the statute of 4 H. 7. as you may see fol. 11 and 12.

* P. 349. The observation made by Dr. *Saunders* at the bar is not to be omitted, viz. that between 4 H. 7. and 26 H. 8. there were almost fifty years, and yet in all that time no estate-tail was ever forfeited for treason. And what reason had the judges to construe the general words of 4 H. 7. that a fine should bind as well privies or strangers, that the issues shall be bound by a voluntary act of tenant in tail, and yet that he shall not forfeit his estate for treason, which is the highest offence?

Add to this, that *St. Germin* in his book called *Doctor & Stud.* written 23 H. 8. and commended by the Lord *Coke* in his epistle to his 9th *Rep.* when he examines the question how common recoveries of lands intailed might stand with conscience, *Lib. 1 cap. 26. fol. 41.* never mentions fines, and certainly he would not have omitted them had they been used to have been then levied of intailed lands; for issues were as much prejudiced by them as by common recoveries. 1. From the penning of the act of 32 H. 8. The words whereof are, *be it enacted*, not *declared*. 2. That fines heretofore levied, which shews that fines were levied of intailed lands, but wanted the support of an act of Parliament. 3. That this act shall not extend to lands, whereof the reversion is in the King, but that every such

Term. Hill. 31 & 32 Car. 2. In Scacc.

such fine shall be of like force as it was or should be if this act had not been made. Then cometh the Statute of 34 H. 8. which says, that there was a greater mischief by this doubt for a recovery, but not by a fine, which shews that fines were not used in such cases.

True it is, that recoveries did bar the issues before 34 H. 8. as 'tis resolved in *Wiseman's case*, 2 Co. 16. a. and reason there was for it. 1. By reason of the pretended recompence as in *Octavian Lombard's case*, 44 E. 3. 21. cited in 1 Co. 94. b. tenant in tail grants a rent for a release of one who hath right to the land, it shall bind the issues. 2. But adly, for the reason given by brother *Maynard*, that recoveries in adversary writs did bar in all cases, till the *Quod ei de forceat* was given by *Westm.* 2. 4. which was the same Parliament that the statute *de Donis* was made. And so is 19 E. 3. F. *Recovery in Value* 20 Hill. 23 E. 3. F. *Recovery in Value* 13. 44 Ass. 35. Mich. 44 E. 3. 29 b. pl. 9 Pasch. 5 E. 4. 2. a. pl. 11. 10. Co. 43. b. But in case of fines it was otherwise.

And yet to prevent all doubts in that case the judges have construed the Statute of 34 H. 8. to extend to fines, as appears by *Notley's case*, cited in *Stafford's case*, which though objected against as not to be found elsewhere, yet it is no spurious case; for 'tis reported again by Baron *Savil* 105. pl. 183. where the case upon a replevin (upon which the pleading is set out at large) was, that king H. 8. being seised in fee in right of his Crown, granted the lands to *Philip Van Wilder* in tail male, after whose death the same descended to his son *Henry Van Wilder*, to whom *Weston* and *Gibs* acknowledged a fine, and he granted and rendered the land to them for 4000 years, and then died. And whether this lease were good, being made by *fine sur render* to bind the issues in tail, was the question, and no judgment; but seemed that it did not bind.

So that upon the whole matter, as to this point I hold, that though this case be out of the Statute of 34 H. 8. yet not alienable by the Statutes of 4 H. 7. or 32 H. 8.

I come now to the second great point, viz. what influence the Statute of 34 H. 8. hath upon this case.

In handling of which the great difficulty will appear to arise out of the construction of the private act of 4 Jac.

For the true intelligence whereof we are to consider,

1. The mischiefs which had befallen the family of *Darby*.
2. The remedy which this act applies.
3. The consequences which do arise hereby.

Y

As

Term. Hill. 31 & 32 Car. 2. In Scacc.

As for the mischiefs, they appear in the preamble of the act, that by the death of Earl *Ferdinand*, who died without issue male, and left three daughters married into three noble families, those daughters had no certainty of their portions; and lands they were as incertain of, though heirs at law to their father, the reason that the same were intailed upon the heir male of the family, either by the Crown, or by some precedent ancestor. 2. The Lady *Alice* their mother and dowager, and relict of Earl *Ferdinand*, though intitled to dower, as the widow of one dying seised of lands of inheritance, yet not able to bring a writ of dower with any certainty, because ignorant of the tenant of the freehold. 3. Some of the branches of the family, by reason of the antiquity either of the limitations of the estates found in offices, or ancient settlements, incertain which of them shall immediately succeed Earl *William* in case he shall die without issue male. And 4. All of them incertain what lands were settled one way, and what another; and hence arose diverse variances, suits and controversies.

The remedy was, that all the said parties referred themselves to five honourable persons who were well affected friends of all of them; and thereupon they award the lands to be settled as in the act.

* P. 351. • The consequence of which will be either one way or other, as the true construction of the same act shall happen to be made, viz.

Whether this act thus settling the lands hath altered, and made the estate formerly settled in the family, another estate substantially or specifically (as the logicians say) different from what it was before; for if the estate do now become new, then 'twill be for the defendant; but if the old estate-tail did remain in Earl *Charles* when he made the conveyance, it will be for the plaintiff.

And I am of opinion, that the estate-tail granted by the letters patent is not altered by the act of Parliament.

And my chief reason shall be taken from the intent and meaning of the act, and of all the parties concerned, which being only a private act, is to be considered as a settlement made by the legislative power of the kingdom. 1 Co. 47. b.

Wherein the parties to be more especially taken notice of, are,

1. The *Derby* family.
2. The Referees.
3. The King. Every of which we cannot but presume had notice of the letters patent.

1. For

Term. Hill. 31 & 32 Car. 2. In Scacc.

1. For were it not for them, it doth not appear by the record how the daughters of Earl *Ferdinand* could be disturbed from enjoying the lands in question as heirs at law to their father; were it not for them, Earl *William* could have no pretence.

2. The Referees must needs know of them; for one of the Referees was then Lord Treasurer, and there is a rent of 50*l. per annum* reserved, and in charge in the Exchequer.

3. The King's counsel could not but know them; for in all acts of Parliament, 'tis their duty to examine how far the the Crown's interest is concerned.

And this knowledge and notice of the letters patent produced the words so frequently in the acts, viz. In the recital of the award, *that all the said lands which were of the Earl Ferdinand should be assigned, conveyed and enjoyed, unto, and by such persons, for such estates, and with and under such limitations, powers, liberties, declarations and savings as is afterwards expressed.* 3. *And * that the same shall be vested, adjudged, deemed and taken to be in the said persons for such estates, and with and under such powers, liberties, provisoes, exceptions, declarations and savings, as afterwards is mentioned, declared, limited and expressed.* 4. The proviso itself.

P. 352.

All which do shew that the act was intended to pass *sub modo*, and that there should be somewhat preserved from being destroyed thereby; and in truth so there was.

For by the letters patent it appears, that the patentees (under whom the lessor doth derive) were persons well deserving of the Crown; and therefore *ob singulare & fidele servitium qd nobis præantea impenderunt, ac pro bono & fideli servitio nobis & Hæridibus nostris regibus Angliæ per eosdem Thomam & Georgium & Hæredes suos pro defensione nostra & regni nostri contra quoscumq; proditores inimicos & rebelles quoties futuris temporibus opus erit impendend.* &c. the King grants; so that he did not only respect what was past, but also service to be done for the future; and not only by them, but their descendents and heirs, and to the King and his heirs.

Now whether this would make any condition or tie of any sort in law upon the estate, may be doubtful, though *Hob.* 41. says, that *pro & in consideratione*, do not regularly, and in the case of a common person, purport a condition.

But most certain it is, that the King and his counsel intended that those words should signify somewhat.

The Parliament in 11 H. 7. had so great regard to such gifts of offices or annuities, that they bound the grantees to attend the King and his heirs in person in his wars, upon

Term. Hill. 31 & 32 Car. 2. In. Scacc.

pain of forfeiture, though there was no such consideration mentioned in the patent; as you may see 11 H. 7. cap. 18.

And the act of 34 H. 8. takes notice; for the words are,

To the intent that recompence for such service of the donees should not only be a benefit for their own persons, but a continual profit for the heirs of their bodies, whereby such heirs should have in special memory, and daily remembrance, the profit that they have, and take by the service of their ancestors done to the Kings of this realm, and thereby be the better encouraged to do like service to their sovereign lord, as to their duties of allegiance appertaineth.

* P. 353.

* And the advantage the Crown receives by such remembrance in public families is not final, and therefore the ground of that act was very considerable both for the King's honour and his profit.

Now this advantage is utterly lost if the estate granted by R. 3. be altered by this act of 4 Jac. which as the times then were, and as the family of the house of Derby was then affected, would never be allowed, either by the King or any of the parties concerned in the act: for observe the time of the making the same; 'twas the next year after the attempt of the gun-powder treason, and not quite, or at least but two years after an attempt, or at least an apparent inclination of another contrary party against the Crown and established government, as appears by the resolution in 2 Cr. 37. So that had any of the parties or the King been asked whether they intended to dissolve the tie (of honour at least) between the family and the crown, in relation to the service they owed to the crown specified in the first gift, they would have returned a negative answer without doubt.

Add to this, that the proviso itself is not a bare saving, which might have been excepted against, as opposing, or not well consisting with other parts of the act, as in *Porter's* case it is objected; but it is an enacting clause, whereby it is enacted, *that the king shall have, hold and enjoy all such and the same rights, titles, profits, commodities, emoluments, claims and demands, as if the act had not been made.*

By all which it most plainly appears, that 'twas the intent of the act that the estate should not be altered.

Then, to construe this act otherwise, if possible to prevent it, is to make it support a fraud to the king. *Rex fallere non vult, falli non potest.* 12 Co. 3.

This being so, it must be considered, whether this intention can consist with the rules of law. In examination whereof the objections are in order to be considered.

Object.

Term. Hill 31 & 32 Car. 2. In Scacc.

Object. 1. The lady *Alice* hath an estate for life, which she cannot have out of the old estate-tail of earl *William*.

Resp. 1. This consists with the former estate, because but of a third part, and so in lieu of dower; and to prevent her danger of suit, which could not be with ease, for want knowledge of a right tenant of the freehold.

* 2. But however, she is dead, and so no objection; * P. 354. for though that might have altered the intail, it would be but during the continuance of the estate for life, which is determined.

Object. 2. Earl *William* hath hereby only an estate for life.

Resp. The act doth but pare away part of the intail, and leave an estate for life; for though an estate for life cannot be said to be the same estate with the intail, yet the original intail is not hereby altered in the issue of earl *William*; as in the case of the lord *Delaware*, 11 Co. 1. he had an estate-tail in his honour, and disabled for his life; and so part of the estate in the honour suspended by act of Parliament; and this is here an execution of the agreement.

Object. 3. Earl *James* hath an estate in his father's lifetime, which he could not have by the first intail.

Resp. Here is no gift of an estate, but a distribution of the enjoyment of it, nevertheless consistent with the former estate; for all is within the compass of the first intail: and it is but a confirmation of an agreement, as acts of Parliament for confirming inclosures, or establishing custom for common, or a partition between tenants in tail. And this act of Parliament works in this case, not by way of gift, but by ordinance, as letters patent, whereby the king may erect a fair, market, warren, park, forest, piscary, or the like, by ordinance, without granting them to any, *Hob.* 15. the case of burgesses of parliament.

Object. 4. Earl *William* hath power to make leases, which he could not do as tenant for life.

Resp. Such power alters not the estate, for it is but a collateral qualification, and such a thing as may *adesse & abesse sine interitu subjecti*.

Object. 5. Power in tenant for life, and in earl *William*'s sons, to make jointures.

Resp. Observe, that the power is but of a third part, and so to supply dower, that there may be a writ of dower brought, wherein difficulty may be of finding a right tenant of the freehold.

Object. 6. If the parties shall bring a *formedon*, they must declare upon this act, and not upon the letters patent.

Resp.

Term. Hill. 31 & 32 Car. 2. In Scacc.

* P. 355. *Resp.* The heir need not bring any action, for he may enter. But 2. If he will bring his action, he must declare upon both letters patent and act; for suppose the intail be spent, * the king in a *formedon in reverter* must declare upon the letters patent only.

Object. 7. In all estates-tail there must be donor and donee, and here the king cannot be the donor.

Resp. An act of parliament can create an estate-tail without a donor; and where we see estates limited for a particular purpose, we are not to measure the validity of such limitations by the strict rules of the common law; for the parliament can control the rules of the common law, 13 Ca. 64. It can make an estate of freehold to cease as if the party were dead; as the estate of a parson who accepts a second benefice contrary to the statute of 21 H. 8. of pluralities, 6 Co. 40 b. and for this cause the lord *Hobart* says, p. 346. That judges have authority to mould statute laws according to reason and best convenience, to the truest and best use, especially considering that the parliament proceeds many crimes according to natural equity *secundum æquum & bonum*, which is *lex legum*, without respect to legal ceremonies. *Hob.* 224. So that where the drift and sole intent of an act of parliament is most plainly discerned, as in this case, and yet that intention cannot be observed, were the same in a deed, by construction according to the rules of law, we ought rather to presume the parliament (in whose power it was so to do) resolved to leap over and waive the rules of law, and to make a particular law for that occasion. As for the purpose in the prince's case, 8 Co. 16. The honour of duke of Cornwall is limited to prince Edward, *& ipsius & hæred. suorum regum Angliæ filiis primogenitis & dicti loci Ducibus & Regni Angliæ hæreditarie successuris*. By which, he that ought to inherit by virtue of that grant, ought to be the eldest son and heir apparent of the king of England, and of such a king as is heir to prince Edward, and that such an eldest son and heir apparent to the crown shall inherit the said dukedom in the life of the king his father; and the lands there mentioned are accordingly annexed to the dukedom for the same estate.

Now by what rules of law could this grant be construed in this manner? certainly by none, but the judges were forced to bend and conform their legal reason to the words of the act of parliament, and rather to construe the words literally, and that the parliament intended to create a new limitation as well as a new title, rather than to strain the sense of the words,

words and the construction thereof farther than ever the parliament intended. They did not stretch their invention to * find * P. 356. out legal reasons for that limitation, as men that would shew themselves more witty than serious, might have done. But *qui rationem in omnibus quærit, rationem confundit*. And they gave the same reason for their resolution, which appears in this case, viz. That otherwise it would be impossible to make good that limitation; and if they should not make such construction, the whole design of the act of parliament would be frustrated. So here the design was, that the agreement and award should be performed, and yet the king not prejudiced, which cannot be if not construed as the plaintiff would have it.

True it is, should the letters patent be left out of the verdict, and the differences, and the award and the agreement and proviso struck out of the act of parliament, I should not doubt but to account the estates therein mentioned to be all new, and that all the estate in the letters patent, except the king's reversion, to be totally altered; but all those things considered together, I think it must necessarily be otherwise.

Object. 8. The act of 34 H. 8. ought to be strictly construed, because it restrains alienation.

Resp. If it were to restrain such alienations as are favoured in law, viz. Of tenant in fee-simple, or tenant in tail of the gift of a subject, whereby trade and commerce might be prevented, debts unpaid, and children unprovided for, which is the reason that the law disallows of perpetuities and conditions which restrain alienation, doubtless the act were to be construed strictly.

But this act carries a reason in its preamble answerable to those inconveniencies, *that the grantees should not alien, for that the lands were given to the intent that recompence should not only be to the donees for their service, but a perpetual profit to their heirs of their bodies, whereby such heirs should have in special memory, and daily remembrance, the profit that they have and take by the service of their ancestors done to the kings of this realm, and thereby be the better encouraged to do like service to their sovereign lord, as to their duties of allegiance appertaineth.*

Now the said inconveniencies will not fail in such cases.

1. Because the lands thus disposed are not many, *et ad ea quæ frequentius accidunt jura adaptantur.*

2. They are to persons generally of noble families, of whom the crown hath always a care.

3. This

* P. 357. * 3. This law is for support of the crown and government, which ought to be secured before all private interests.

Object. 9. The tenure is altered by this act of parliament.

Resp. Tenure is not an essential quality to an estate, for there are estates whose tenures may be gone, and yet the estate remains; as suppose the king had released the tenure of knights service, and that the patentees should hold in socage, yet the estate-tail had continued the same. 4 Co. 9. a. If a mesnalty become a rent-seck by surplusage, the ancient seisin is sufficient. 1 H. 4. 4. If H. recovers in an assise, a rent-service, and afterwards that rent becomes a rent-seck and he is disseised of it, he shall have a redisseisin, because the substance of the rent remains, though the quality be altered. Co. Lit. 154 b.

Object 10. The estate-tail was without impeachment of waste, so is not the estate for life here.

Resp. The quality of being without impeachment of waste makes no alteration. 3 Cro. 40. *Clare versus Pepys*.

Object. 11. By the letters patent there was one intire estate given, but here are several estates for life, and estates-tail, which are not intire.

Resp. These estates are all the same in quantity, which they would have been without the act; and it is the same estate as to duration, for all the estates here do arise out of the original estate-tail, and the reversion is not touched.

Object. 12. Lastly, these estates do arise out of the estate-tail, and are to continue no longer, and are distinct from it; as if tenant in tail bargain and sell to one and his heirs, the bargainee hath fee, and the estate granted continues till the issue enters.

Resp. True it is, that such construction may be made in a conveyance, and so might it have been in this act, had not the intent appeared otherwise; but therefore it shall not be so construed here, because it would prejudice the king's interest contrary to the proviso.

And in the exposition of an act of parliament we need not labour in maintaing its conformity to the rules of law, when its design is for another purpose.

Tenant in tail makes a lease for three lives, by 32 H. 8. this cannot be made good by the rules of the common law.

* P. 358. * As for authorities in this case, *Gardiner's case* 14 Car. 2. cited by my brother *Weston*, is nothing to this purpose, which was, that H. 8. gave to *Michael Stanhope* and his

Term. Hill. 31 & 32 Car. 2. In Scacc.

his wife, and the heirs of their bodies certain lands, *Michael* dies, the lands descend to *Thomas Stanhope* his son and heir, who petitions the queen to grant the reversion to some persons in fee, to the intent that he may make a lease for ninety-nine years by way of mortgage, and enters into a recognizance to the queen, conditioned, that nothing shall be done whilst the reversion is out of the crown, prejudicial to the crown.

The queen conveys the reversion to the lord *Burleigh* and *Sir Walter Mildmay* in fee, *Thomas Stanhope* makes a lease and then suffers a recovery, the trustees reconvey to the queen.

Resolv. 1. 'Twas a good grant.

2. *Thomas Stanhope* was not restrained from aliening.

But I may resemble this to the case of *Falkner* and *Beltingham*, *Mich.* 3 *Car.* 1. in *C. B.* reported by 1 *Cr.* 80. and *Jones* 233. The case was this, *Ultimus presbyter celebrando divina* in the church of *East Grinstead* was seised in fee of a messuage and lands *in jure presbyteratus sui*, and held them of the lord of the manor of *Brambleton*, by the rent of 18s. and other services, who became seised of the rent. By the statute of 1 *E.* 6. *cap.* 14. this messuage and lands became forfeited to the crown; but in that statute there is a saving of all rents and services to all other persons. The king granted the lands over, and no seisin was had of the rent for above forty years after the statute of 1 *E.* 6. And whether seisin within forty years was necessary, or no, was the question; for if it were the same rent, then seisin was necessary; but if a new rent created by the statute, then seisin was not necessary. And resolved by three justices *contra* two in *C. B.* that it was a new rent; and there held by the three justices, that this rent being originally a rent-service, was now turned into rent seck by the act of parliament, and became a rent coming out of the womb of the parliament, as justice *Hutton* called it; and though it were the same rent in estate, as if there were tenant for life, the remainder in fee, or if descendible on the part of the mother; so now; yet altered in quality.

But the other two justices, and the whole court of *B. R.* wherein the first judgment was reversed, resolved, that it is the same rent to all purposes, and 'tis parcel of the *manor * P. 359. as before. And it is not a rent given by the statute, because a saving never amounts to a gift of any new thing, but is *quasi* an exception out of the statute, where otherwise it would be extinguished and lost.

And

Term. Hill. 31 & 32 Car. 2. In Scacc.

And they resolved, that though the tenure was destroyed, it remained the same rent in substance, and in all other things; as if an arrow loses one or two feathers, yet it is an arrow still, or if *H.* loses some members, he continues a man still.

As to the Objection, that if the act shall be thus construed, this will be very mischievous, because there are many purchasers for valuable consideration, and it will blow up their estates;

Resp. 1. There can be no case adjudged, but must be mischievous to some body; as 1 Co. 53. a. b. But

2. The mischief appears not in the record.

3. Better suffer a mischief than an inconvenience; for should this act be construed against the intention, the king must lose the advantage before mentioned; and to expound an act so, would be generally inconvenient; and so I conceive judgment ought to be given for the plaintiff.

In this case the court of Exchequer was divided, viz. *Mountague* chief baron, and myself for the plaintiff, and *Atkins* and *Gregory* for the defendant; and thereupon the cause was adjourned into the Exchequer Chamber, where it was argued again by counsel three several times, and also by eleven of the judges; for that *North* chief justice of C. B. was made lord keeper last vacation; and all the judges, except *Gregory*, *Atkins* and *Dolben*, gave their opinions for the plaintiff.

As to the first point, all but *Jones*, *Charlton* and myself, were of opinion, that the issue of tenant in tail was barred by a fine levied by his ancestor, by virtue of the statute of 4 H. 7. before the statute of 32 H. 8. And all who argued for the plaintiff agreed, that the act of 4 Jac. did not destroy the estate created by R. 3. but was only an instrument to perfect the agreement made by the arbitrators in the *Derby* family. The lord keeper's opinion was delivered by the chief justice *Pemberton*, by the lord keeper's direction, accordingly.

Memorandum, This Term were made Serjeants, of the *Inner Temple*, Sir G. Jeoffries Recorder of London, Sir J. Kelyng, one of the King's Counsel, Edmund West, R. Hanson, Sir Fr. Manley and W. Bugby, Of Gray's Inn, Edw. Bigland and W. Richardson of Lincoln's Inn; Rob. Wright of the *Middle Temple*.

Kirton *versus* Guilder.

GUILDER sues the plaintiff in the ecclesiastical Prohibition. court at York, for procurations belonging to him as archdeacon, and libels, that for ten, twenty, thirty and forty years last past there hath been due and paid 6s. annually for the said procurations, by the said Kirton and his predecessors, parsons of D. And Kirton by Hoyle prays a prohibition, and suggests, that the said duty hath not been payable, and denies the prescription, and so the ecclesiastical court cannot have consueance of a prescription, which is properly triable by the common law. *Rastal's Ent.* 483. 2 *Roll. Abr.* 283. pl. 16. 2 *Roll. Rep.* 293.

But *Holt e contra*, that procurations are payable of common right, *Linwood* 67. as tithes are, and no action will lie for the same at common law; and a prescription in the ecclesiastical law may have a different commencement from what it hath by the common law, and a pension is suable in the ecclesiastical law. *F. N. B.* 151. b.

Per Cur. A consultation is granted *quoad* procurations demanded generally; but if the plaintiff denied the *quantum*, then a prohibition.

William Cole Esq; *vers.* William Ireland Gent.
Leicest.

THE plaintiff declares, that whereas 12 November Handred.
27 Car. 2. the king by his letters patent then dated 2 Jones 194.
had made him sheriff of the county of Leicesters, *custodiendum* Pollxf. 606.
quamdiu Skin. 41.

Term. Pasch. 32 Car. 2. B. R.

quamdiu dicto Domino Regi placeret, which office is an ancient office, to which the right and title of naming and constituting a bailiff of the bailiwick of the hundred of *Gartree* in the said county time out of mind hath belonged, and still is incident, annexed and inseparable from the same; * and that every sheriff of the said county for the time being, hath from time to time named, constituted and ought to name and constitute a bailiff of the bailiwick of the hundred aforesaid, and hath held, and of right ought to hold a view of frankpledge of the hundred aforesaid, and a court of the said county; and by occasion thereof divers fees, commodities, profits and emoluments had and received, and of right ought to have and receive as incident thereunto. 29 March 28 Car. 2. The defendant at *Turlington* and elsewhere in and through the said hundred took upon him, and exercised the said office for the space of six months against the will of the plaintiff, and without any right or lawful authority, and without the plaintiff's consent or nomination, the plaintiff being all the while sheriff of the said county: And also the same 29th of March 28 Car. 2. at *Shankton* in the hundred aforesaid, the defendant did of his own wrong, and without right or lawful authority hold a view of frankpledge of the said hundred, and also a court baron, and several courts baron from three weeks to three weeks there did hold, and on that occasion received several profits to the value of 5*l.* ad damnum 40*l.*

The defendant pleads Not guilty, and the jury find a special verdict, viz.

That the plaintiff was made sheriff, as he declares.

That 12 E. 2. the king committed to one *John de Sadington* his hundred of *Gartree*, in these words. Leic. Rex ad requisitionem *Isabellæ Reginæ Angliæ Consortis suæ charissimæ* commisit dilecto sibi *Johanni de Sadington* valedito ipsius *Reginæ Hundred' Regis de Gartree cum pertin' in Com' Leic' custodiend' quamdiu Regi placuerit Reddend' inde Regi per annum ad Scaccarium suum 16*l.** prout ad idem Scaccarium jam redditur pro eodem, Dum tamen *Hundred' ill' custodiat juxta formam Statuti nuper apud Lincoln' inde edit' & provis.* In cujus, &c. Teste Rege apud *Eborum* 6 Febr. per ipsum Regem Et Mandat' est *Johanni de Greydeston* quod eidem *Johanni de Sadington Hundred' præd' cum pertin'* quod in custodia sua ex Commissione Regis existit liberet custodiend' in forma præd'. Teste ut supra.

2 October 1 H. 4. The king granted the same to *William Hoghwick* in hæc verba. Rex omnibus ad quos, &c. salu-

tem.

Term. Pasch. 32. Car. 2. B. R.

Sciatis quod de gratia nostra speciali & pro bono servitio quod dilectus Armiger noster Willielmus Hoghwick nobis impendit & impendet in futuro concessimus eidem Willielmo Hundred' • de Gartree in Com' Leicest' cum • P. 362. pertin' Habend' pro termino vitæ suæ una cum omnibus firm' reddit' secl' Cur' & omnibus aliis rebus proficuis & commoditat' ad præd' Hundred' quoquomodo rationabili spectan' sive pertin' absque aliquo nobis inde reddend' Aliquibus statut' sive ordination' ante dat' præsentium fact' non obstan' In cujus &c. Teste Rege apud Westm. 2. Octob. per breve de privato sigillo.

19 November 15 Jac. The king granted the said hundred to William Ireland father of the defendant, Habend' from Michaelmas last for twenty-one years, Reddend' 17l. 15d. and ob. viz. for the hundred of Goodlaxton mentioned in the letters patent 17l. 19s. 3d. and for the hundred of Gartree, 9l. 2s. ob. and 20s. of increase.

5 September 13 Car. 2. The king granted to the defendant the premisses in these words, viz. Custod' sive firm' separal' Hundred' de Goodlaxton & Gartree cum omnibus & singulis eorum pertinen' in Com' Leic. Ac Officii & Officiorum Seneschalli & Seneschalsiæ Ballivi Ballivat' præd' Hundred' de Goodlaxton & Gartree & eorum alter' cum omnibus & singulis juribus membris pertin' proficuis advantagiis allocation' autoritat' præheminenc' libertat' & emolument' quibuscunque eisdem Offic' Seneschalli & Seneschalsiæ Ballivi & Ballivat' sive Ballivorum vel Ballivatorum nostrorum præd' Hundred' de Goodlaxton & Gartree & eorum alteri qualitercunque spectan' vel pertin' ac cum omnibus vadis feodis proficuis commoditat' & advantag' quibuscunque eisdem Officiis aut eorum alicui ut prædict' qualitercunque spectan' pertinen' sive debend' una cum executione omnium & singulorum brevium process. præcept' summonitorum arrestat' warrant, attachiament' & mandatorum nostrorum hæred' & successorum nostrorum infra separal' Hundred' præd' exequend' & emergent' adeo plene libere & integre ac in tam amplis modo & forma prout aliquis Ballivus vel aliqui Ballivi separal' Hundred' præd' exequi vel facere possit vel possint debet vel debent gavissus fuit vel habuit gaviss' fuer' vel habuer' vel gaudere debuit vel debuere Nec non custod' letarum vis. franc' pleg' & cur' præd' separal' hundred, & turn' vicecom. infra separal' hundred' præd' & eorum alter. Ac omnium proficuum earundem letarum vis. franc' pleg' & cur' hundred' & turn' & eorum cujuslibet

• P. 363. bet Necnon amerciament' fines poenas forisfact' secl' servie reddit' perquisition' cur' let' & vis. franc' pleg' & omnium aliorum proficuorum commoditat' libertat' privileg' franchises jurisdiction' & emolument' quorumcunque infra * separal' hundred' præd' quoquomodo provenien' dictis separal' hundred' & officiis præd' seu eorum alicui pertinen' spectan' sive acciden' aut ut pars vel parcell' eorundem Hundred' Ballivi & Ballivat' seu aliquorum eorum habit' cognit' accept' usitat' occupat' seu gavis. existen' cum libertate pro levation' & collectione eorundem infra separal' hundred' præd' Ac etiam custod' sive firm' omnium & omnimodorum bonorum & catallorum felon' fugitivorum felon' de se & in exigend' posit' condemnat' & utlagat' sive waviat' bonorum waviat' & extrahur' emergen' crescen' contingen' sive provenien' dict' separal' Hundred' & Ballivat' præd' seu eorum alicui quoquomodo spectan' sive pertinen' aut cum eisdem aut eorum aliquo usitat' dimiss. locat' sive gavis. Quæ quidem Hundred' & cætera præmissa per Literas nostras Patentes dimiss. sunt parcel' possession' antiquæ coronæ nostræ Angliæ. Except' tamen semper & extra hanc præsentem concession' nobis hæred' & successor' nostris omnino reservat' omnibus & omnimod' fin' amerciament' & exitibus annuatim & de tempore in tempus provenien' crescen' sive renovan' seu quovismodo forisfact' in aliqua cur' nostra hæred' & successorum nostrorum de recordo sive aliquibus cur' nostris de recordo sive coram Justic' nostris ad Assisas Justic' ad pacem sive Clerico Mercati provenien' crescen' acciden' emergen' sive renovan' Ac etiam libertat' pro levation' & collectione eorundem infra separal' Hundred' præd' Habend' from the making of the letters patent for thirty-one years. Reddend' annuatim 18*l.* and 15*d. ob.* and 10*s.* increase.

The jury also find the statutes of 2 *E. 3. cap. 12.* and 14 *E. cap. 9.* That the defendant did keep the courts and receive the profits of the hundred, as the plaintiff hath declared; and if the plaintiff be guilty they assess 5*l.* damage.

Lovel for the plaintiff. The single question is, Whether the grant of this hundred, and other things therein specified be good? and I hold that the same is not good in law.

Hundreds and bailiwicks granted before *Edward* the second's time are good, but not those which have been granted afterwards. As to the original of hundreds before king *Alfred's* time, which was *Anno 872.* the counties remained intire, but then divided into hundreds; for before that the earls who were *consanguinei* of the king and of the royal blood

blood had the custody thereof. This office continued in the earls till by reason of the great trouble, they were weary of it, and then were appointed *Vicecomites*, which continue to this day. This office was assisted with inferior * jurisdictions, as view of frankpledge and turn, to take in- * P. 364.
rolment of the freeholders. The hundred court, &c. and these courts continued until *Edward* the second's time, and then the king granted out of the turn the leet, and out of the hundred court a court baron. *Fitz. Leet* 11. *Br. Leet* 26. *Dyer* 13. b. 64. But notwithstanding these courts were thus clipped out of the county, yet the jurisdiction of the county remained intire to the sheriff, until afterwards the king granted some hundreds away in fee, and also franchises to several other persons. And thereupon several statutes were made to restrain the mischiefs of such grants, whereby insufficient persons were become owners of them, and managed them to the prejudice of the people, viz. 9 E. 2. the statute of *Lincoln*, which enjoins, that the sheriffs have sufficient in the county to answer the king; and so of farmers of hundreds, and that executions shall be made by bailiffs of hundreds: So 2 E. 3. cap. 4. and 5. But those statutes did not remedy the inconvenience, for the crown did grant bailiwicks in fee, and thereupon were the acts of 2 E. 3. cap. 12. and 14 E. 3. cap. 9. made, both which statutes do forbid the granting more bailiwicks than were then granted.

As to the things granted they are five, and none of them grantable.

1. Courts. They are not grantable by the king, because the turn is called the sheriff's turn, 31 E. 3. cap. 15. and so *Pasch.* 6 H. 7. 2. pl. 4. And the county court is the sheriff's. 4 Co. 33. a. *Mitton's* case.

2. Offices. The officers of these courts belong to the sheriff. *Mitton's* case, *Scrog's* case, *Dyer* 175.

3. Fines and profits. They are the sheriffs, 1 E. 3. they shall be delivered to the use of the sheriff.

4. Bailiwicks. That is incident to the office of the sheriff, and he ought to answer for him. *Dyer* 241. a. pl. 47.

5. Hundred. If the sheriff shall not have it, he cannot answer for escapes there.

This very case resolved, 2 Car. *Fortescue's* case, Co. 4. *Inst.* 367.

Bigland contra. As to the case of *Mitton*, and other cases, wherein certain offices incident to sheriffs are alledged, they stand upon different reasons from our case.

The king may except any part of the county from the power

Term. Pasch. 32 Car. 2. B. R.

power of the sheriff. 1 Roll. Rep. 118. *Villa de Derby versus Foxley.*

Of common right a hundred belongs to the king. 2 Roll. Abr. 73. b.

- * P. 365. * As to the statutes, That of 2 E. 3. cap. 12. extends only to such hundreds as were let to farm by the then king, and the statute of 14 E. 3. cap. 9. is relative to the other act, and ancient statutes are construed according to the subsequent usage. *Et adjournatur.* And afterwards, viz. Pasch. 34 Car. 2. Judgment was given for the plaintiff.

Ambrosius Manaton's Case.

Mandamus.
Trem. 450.

AMBROSIIUS MANATON had a *Mandamus* directed to Charles Luxon mayor of the borough of Trevena Bescny in the county of Cornwall, to be sworn mayor there, according to an election made of him by the said borough, to which writ the said Charles Luxon returns, that before the coming of the writ, and before the issuing out thereof, viz. 25 Octob. 31 Car. 2. he the said Charles was removed from the place of mayor, and one William Amy then chose, admitted and sworn, and from that time *hucusque fuit & adhuc est Major Burgi prædicti*, and by reason of his said office hath the custody of the common seal, and thereupon he the said Charles could not restore him, as the writ requires; And whether this was a good return was the question? And the objection is, because it is not returned, that the new mayor Amy was *debito modo electus*, and it may be that he was chose out of time, and not according to charter. 2. Returns must be certain, and not by implication, because the party outed hath not liberty to reply to them; and of this opinion were my brother Dolben and myself; but Scrogs chief justice, and Jones justice *contra*, That when Amy is returned, he shall be intended *debito modo electus*; and if an action upon the case shall be brought for this false return, and the issue be elected or not; if he was not duly elected, it will go for the plaintiff in the action; as Co. Lit. 381. Fines levied, is intended lawfully levied, *Westm. 2. cap. 5. Ita quod Episcopus Ecclesiam conferat, i. e. legitime conferat. Non præstat impedimentum quod de jure non sortitur effectum.* But I do conceive, and was then of opinion, that the return is not good, because only by implication. As the case of the recorder of Barnstable, Pasch. 18 Car. 2. B. R. The return was, *Non constat nobis*, that he was ever elected; and adjudged insufficient. *Vide antea.* And these places

Term. Pasch. 32 Car. 2. B. R.

places do concern the publick government, and we ought not to favour false returns; and if we suspect a return to be false, this court can make a corporation * swear the return; * P. 366. but by reason the court was divided no writ went.

Constance Harvey *Widow of Henry Harvey, Demandant, versus Francis Harvey. In Dower.*
In C. B.

THE tenant pleads, That 'after marriage the husband had settled other lands upon the demandant for her life, for her jointure, and that she after his death agreed thereto, and entered accordingly. The demandant replies, That it was a voluntary settlement of her husband, and traverses, that it was not for her jointure, and issue thereupon; and at the *Nisi Prius* the tenant made default, and a petty *Cape* awarded and returned, and judgment, that the demandant have seisin; and the demandant suggests, that her husband died seised, and prays a writ to enquire of the damages, returnable *Crasfin. Pur.* The sheriff returned, that he hath delivered seisin of the lands particularly; and also an inquisition, which finds that the lands are worth 114*l.* 11*s.* *per annum*, and that her husband had been dead six years and three quarters, and that she had sustained damages *occasione detentionis dotis ultra valorem præd' & ultra misas & custag' sua 195*l.* & pro mis. & custag. 20*s.** And upon this *Constance*, *gratis* releases the 195*l.* and demands judgment only for the 20*s.* And judgment is given, That the demandant recover *tam valorem tertiæ partis præd. from the death of her husband, which comes to 257*l.* and the 20*s.* and 11*l.* de incremento, in all 269*l.* and the tenant brings a writ of error, and assigns several things for error, which are made good upon diminution alledged, and there being a variance between the inquisition and the writ of seisin, the writ of seisin and execution was erroneous, and thereupon a writ of enquiry, and the value of the land found; and now alledged, that here ought to be no writ of enquiry, because the damages were released by the demandant. But upon consideration had of the record, the whole court resolved, that the release was only of the damages sustained *occasione detentionis dotis*, and not of the mesne profits of the land, for they are two distinct things, as appears by the precedents. *Co. Lit. 32. b. Belfield versus Rous.* The writ is to enquire not only of the value of the lands, but also of the damages *ratione detentionis dotis*, and judgment accordingly.*

Z

So

Error.

² Jon. 121.

² Show. 61.

* P. 367. So is *Rast. Entr.* 237. *Tit. Dower en* * *Judgment* 13. and so are all the judgments; and a *Fi. fa.* lies for the damages, *Formule bene placitandi* 223. And judgment was affirmed.

Sir Miles Stapleton's Case.

Court.

SIR Miles Stapleton having been arraigned at the king's bench bar this last term for high treason, and a day appointed next term for his trial; the prosecutor, one *Boldron*, suggested to the lords of the privy council, that his wife, who he said was a material witness, was in expectation of being brought to bed every day, and so she could not be at the trial, and therefore desired the prisoner might be tried in the country; and thereupon the lords of the council ordered, that the judges of the king's bench should be attended, and to consider whether the indictment may be sent down into *Yorkshire* to be tried there next assizes by *Nisi Prius*, and whether a *Tales* is grantable in case of high treason; whereupon Mr. Attorney general attended at my brother *Jones's* chamber, where my brother *Dalben* and I discoursed together concerning this matter, my lord chief justice being out of town, and we did resolve, 1. That an indictment of high treason may be tried by *Nisi Prius*, for so is *Co. 4 Inst.* 73. and the statute of 14 H. 6. cap. 1. gives power to the judges of *Nisi Prius* to give judgment, and award execution in cases of felony and treason, which cannot be but where such offences are tried by *Nisi Prius*, for *quatenus* judges of *Nisi Prius* they cannot give judgment in cases not legally coming before them. As for felony and murder, indictments removed into the king's bench concerning these offences, may be sent down to be determined by virtue of 6 H. 8. cap. 6. but that statute extends not to treason. 2. We resolved, That a *Tales de circumstantibus* may be awarded in case of treason, by the statute of 4 and 5 Ph. and Mar. cap. 7. where the king is party. And so we left it to Mr. Attorney to do as he shall see cause, with the prisoner.

* P. 368. * William Muschamp and others, Plaintiffs, *versus* Henry Aston, Defendant. *Error, Ireland.*

Duties.

THE plaintiff below declares that he was possessed of two hundred twenty-six hundred and an half of lamb-skins,

Term. Pasch. 32 Car. 2. B. R.

skins, and intended to transport them from the port of the city of *Dublin* to *England*, and for the exportation of the same skins had paid tonnage and poundage, according to an act of parliament made at *Dublin* 4 March 14 Car. 2. viz. For every hundred 10d. The defendant *vi & armis* did assault the plaintiff, and hindered him from exporting the said skins till he had paid 84*l.* 8*s.* 11*d.* over and above the said duty of 10d. per cent. *ad damnum* 200*l.* The defendants plead Not guilty to all, but the hinderance of the exportation till payment of the 84*l.* 8*s.* 11*d.* and as to that they say, That by the same act it is enacted, *That every one exporting Irish wool out of the kingdom of Ireland shall pay to the king upon the exportation thereof, for every stone containing 18lb. 1s. 8d.* That 8 April 1676. the king by indenture granted the duty to the defendant, *Habend.* from Christmas 1675. till Christmas 1682. That there was upon the said skins 1351 stone, and 7-eighths of a stone of wool of six months growth, and that 84*l.* 8*s.* 11*d.* was due for the same; and for not payment a seizure *prout.* The plaintiff demurred. This action was originally brought in the Common Pleas in *Ireland*, and judgment there given for the plaintiff; and upon a writ of error in *B. R.* in *Ireland*, that judgment affirmed; and now the defendants have brought this writ; and upon debate, whether the duty should be paid both for the skins and the wool separately and distinctly, We all resolved, That there shall be but only one duty paid, viz. for the skins; for it cannot be presumed, that men will kill the lambs barely to deprive the king of his customs; and by the act of parliament,

	<i>l.</i>	<i>s.</i>	<i>d.</i>
Sheep-skins tawed with the wool on, an hundred	1	10	0
Pelts drest or undrest, without the wool, an hundred	1	0	0
Sheep-skins with the wool, the hundred	1	0	0
Lamb-skins drest or undrest, the hundred	0	16	8

By which it appears that lamb-skins are to contain the wool on them; and it is not usual in many places to shear lambs, and therefore judgment was affirmed. *Per tot Cur.*

Witness.

THE first day of this term *Elizabeth Celier*, the wife of *Peter Celier*, was tried at the bar upon an indictment, for That she, with others unknown, 1 November 31 Car. 2. did compass and intend the death of the KING, to change the government, and extirpate the Protestant religion, and to that purpose did meet and advise together, and did contribute, pay and disburse great sums of money; and for better concealing of the treasons aforesaid, did disburse great sums of money to divers persons to lay and charge the treasons upon other persons. Upon not guilty pleaded, she was found not guilty. There was one person who came against her as a witness, who was the then prosecutor, *Thomas Dangerfield*, against whose evidence the prisoner excepted, for that he had been several times convicted of cheating, and had been set upon the pillory, and had been whipped, and was of very little credit, and then would have produced a pardon of these offences; but she produced a copy of a conviction of a felony, for which he was burnt in the hand, which was out of that pardon; and also an outlawry for another felony, which was likewise out of that pardon; and so his testimony was set aside. And it was debated, That admit a witness be convicted of felony, and afterwards pardoned, whether he shall thereby be restored to be a good witness? and my lord chief justice *Scroggs* and myself were of opinion, That he could not, because the pardon doth take away the punishment due to the offence, but cannot restore the person to his reputation; and of that opinion was justice *Nichols* in *Cuddington* and *Wilkins's* case, *Moor* 872. pl. 1213. But my brother *Jones* and *Dolben* contra; and so afterwards did I conceive; for in the case of *Cuddington* and *Wilkins*, as 'tis reported in *Hobart*, 'tis said, That the pardon takes away not only *pœnam*, but *reatum*. Another question was started, viz. Whether a man convicted and burned in the hand be stigmatique as to his testimony? And *Jones* held that he was not, because the burning of the hand * is no part of his judgment, and is by 4 H. 7. cap. 13. only to

* P. 370.

notify

notify
Co. 5.
and d
pound
571.
again
not p
truth
entry
manu
whole
case,
virtue
enlarg
clear
witness
William

Thom

T
portion
tory o
cerning
one H
by the
tion th
acquit
omnes a
Mead,
Castlem
the pla
the the
growing
ceived

1. T
right o
tion of

* 2.
ely rec
ruption

3. T

Term. Trin. 32 Car. 2. 1680. B. R.

notify to the judge that he hath had his clergy before, 5 Co. 50. a. *Biggins's* case. But I have examined that case, and do find that no judgment was given therein, but compounded, as 'tis reported both by 3 Cro. 682. and by *Moor* 571. pl. 782. And *Cro.* says, there were two judges against two; and *Moor* says, 'twas agreed, the king could not pardon the burning of the hand in an appeal. And in truth it seems to me to be part of the judgment; for the entry is, *Ideo consideratum est, quod le offender cauterizetur in manu sua laeva.* *Rast. Entr.* 1. b. and 56. a. But upon the whole matter it appears by *Heston's* case, cited in *Foxley's* case, 5 Co. 110. a. That the burning in the hand is (by virtue of 18 *Eliz. cap.* 6. which says he shall be forthwith enlarged) in nature of a pardon, and the prisoner is thereby cleared from the offence, and consequently he is a good witness, and not stigmatique. *Hob.* 292. *Searl' versus Williams.*

Thomas Hunt versus William Danvers. *Assumpsit.*
Error in C. B.

THE plaintiff in C. B. declares, That there was a discourse between him and the defendant concerning a portion of tithes in the parish of *Banbury*, and of the rectory of *Banbury*, and concerning divers controversies concerning the same, and concerning a verdict for 18*l.* against one *Henry Tasler* for the tithe of *Berrymore-Mead* obtained by the plaintiff; and thereupon the defendant, in consideration that the plaintiff at the request of the defendant would acquit the said *Henry Tasler* from the said 18*l.* & *acquietaret omnes alios occupatores* of the lands called *Crench, Berrymore-Mead, Burdens, Gabereffes, Little Ful'larke, Great Fullarke, Castlemead, &c.* from all arrears of tithes then unpaid to the plaintiff, and permit the defendant then to receive of the then occupiers of the aforesaid lands, the tithe of hay growing upon the said lands, which then had not been received by the plaintiff, did promise,

1. To allow the tithe of hay of the said closes to be the right of the plaintiff, and clearly to belong to the said portion of tithes.

* 2. That the plaintiff from thence-forward should quietly receive all tithes of the said closes without any interruption or molestation. * P. 371.

3. That he would seal a writing purporting a disclaimer of

Term. Trin, 32 Car. 2. 1680. B. R.

of the defendant and his trustees of the tithes of the said closes.

The plaintiff in fact says, That he hath done all on his part, and assigns for breath, that the defendant did not permit the plaintiff to receive the tithes of the said closes without interruption and molestation; but *Term Mich.* 26 *Car. 2.* did prosecute two suits in the Exchequer chamber, *ad damnum* 300*l.* Upon *Non Assumpsit* pleaded, and verdict and judgment for the plaintiff, the defendant brings a writ of error, and assigns the general error. The sole question proposed by *Holt* of counsel with *Hunt*, the plaintiff in the writ of error, was, Whether a suit in equity be a breach of the agreement, such as the common law can take notice of? and relied upon 3 *Leon.* 72.

And I have considered that book, and others, and do conceive such suit is a disturbance; for, 1. *Ex vi termini*, when a man is in possession, to be *subpœnaed* to appear in chancery is a disturbance. And this suit arises by reason of these tithes, 1 *And.* 137. *pl.* 188. *Burr* versus *Higgs*. Debt upon an obligation, conditioned to permit the plaintiff quietly to take, reap and carry away corn. The defendant pleads *quod permisit*. The plaintiff replies that he came and forbid him to reap; and adjudged a breach of the condition. *Mich.* 47 *E.* 3. 22. *a. pl.* 51. In an assise between two tenants in common, a forbidding by word of mouth to the tenant to pay his rent was adjudged a disseisin.

True it is, that *Selby* and *Chute's* case is, That a suit in chancery is no disturbance, as 'tis reported by *Moor* 859. *pl.* 1179. 1 *Roll. Abr.* 430. *pl.* 15. 1 *Brownl.* 23. But by the record itself, *Winch Intr.* 116. it appears that judgment was given for the plaintiff, and *Winch* was one of the judges that gave the judgment; for this was 11 *Jac.* and he was made judge 9 *Jac.* and so he should know better than any of those who report the case, none of which then attended the court of *C. B.* but *Brownlow*; and this judgment is entered not in his, but in *Waller's* office.

As to the case cited at the bar, 3 *Leon.* 71. The suit was there against the lessor by a stranger; and so the lessee could not be disturbed thereby. And I take such a suit not to be a breach of covenant against incumbrances, because a

* P. 372. * decree is no incumbrance upon the land, but 'tis a molestation to the person. And the law doth take notice of suits in chancery; for a forbearance to sue in chancery is a good consideration to ground an *Assumpsit*, 3 *Cro.* 768. *Dowdenay* versus *Oland*, by the courts of *C. B.* and *B. R.* and so is 3 *Cro.* 847. *Coulston* versus *Carr*. And of this opinion were the

Term. Trin. 32 Car. 2. 1680. B. R.

the other three judges; but my brother *Dolben* found a flaw in the assignment of the breach of the promise; and so it was adjourned.

Viscount Clare *versus* Linch. Error. Ireland.

AN ejectment for lands in the county of *Clare*, of the Term demise of *Peter Cranborough* for ten years. Upon Not guilty pleaded, issue was joined, and then there is an entry upon the roll thus:

Et super hoc pro indifferenti triatione exit' præd' inter partes præd' superius junct' habend' eadem partes ex eorum unanimi consensu & assensu, & ex assensu & consensu eorum Consilii & Attorn' in Cur' Domini Regis coram ipso Rege hic scilicet apud the King's Court prædict' petunt Breve Domini Regis Vic' Com' Corke dirigend' de Venire faciend' coram dicto Domino Rege hic &c. duodecim, &c. de Corpore Com' sui ad triand' exit' præd'. Et quia videtur Cur' hic quod petitio ill' est rationi consona, Ideo præcept' est Vic' Com' Corke præd' quod Venire fac' coram Domino Rege hic scilicet apud the King's Court die Martis proximo post Oñab' Pur' Beatæ Mariæ Virginis duodecim, &c. de Corpore Com' sui per quos &c. qui nec, &c.

Then there is a *Nisi prius* granted to the said county of *Corke*, and the cause there tried, and a bill of exceptions put in, and upon debate in *B. R.* in *Ireland*, judgment was given for *Linch*; and now the lord viscount *Clare* brings a writ of error, and assigns the general error; and the question now debated was, Whether consent can make this trial, had in a foreign county, good, contrary to *Crow* and *Edwards's* case, *Hob.* 5.

And we all resolved that the trial was well had; for the case in *Pasch.* 44 *E.* 3. 6. *b. pl.* 2. is as strong a case, where villenage was tried where the lands lay, and not where the action was brought, as it ought to be by law, but consent made it good, *Vide Dormer's* case, 5 *Co.* where consent shall make good what otherwise would not be so. And *Crow* and * *Edwards's* case, the consent was entered on record, * P. 373. as 'tis in this case. And so judgment was affirmed, in the point resolved 2 *Roll. Rep.* 166. *Macdumcogh* versus *Stafford*, *Palmer* 100. 2 *Roll. Rep.* 363. *Lloyd* versus *Williams*.

Topham

Topham *versus* Pannel.

Condition.

D EBT for 20*l.* upon condition that *Anne Mason alias Fawne*, shall pay 7*l.* 9*s.* 4*d.* such a day to the plaintiff, or personally appear 23 *Jan.* instant, in the house of *William Barnsley*, esq. precisely at ten o'clock in the morning. The defendant pleads, that the said *Anne Mason* upon the said 23*d* day of *January*, and diverse days as well before as after, *ex visitatione Dei ægrota fuit, & sub quodam morbo ex visitatione præd' tant' laboravit, quod eadem Anna totaliter inhabilis ad comparend' super eundem vicefimum tertiam diem Januarii in præd' domo præfat' Willielmi Barnesley devenit, scilicet apud, &c. Et hoc, &c.* The plaintiff demurs.

And first, the court seemed to agree that the plea as to the sickness was good, notwithstanding *Co. Lit.* 259. b. 1 *Anderf.* 32 pl. 79. and *Bro. Saver default* 45 and 48 *Abridgment de Affise* 55. a. and which is allowed an excuse in outlawry for felony, *Fitz. Challenge* 153. For 'tis not barely she was sick, &c. but *ex visitatione Dei ægrota fuit, & totaliter inhabilis ad comparend, &c.*

But 2*dly*, They resolved, that though the condition be in the disjunctive, and one part is impossible, yet that the other ought to be performed, as the case is, because to be done by a stranger; and my brother *Dolben* urged, that the reason given by the lord *Coke*, was not needful in that case; and by that reason there given, if I sell my land, and desire the purchaser to pay the money down, and I will either make him an assurance, or pay the money; if I die, the money would be lost. And judgment was given for the plaintiff; for this reason chiefly, that the appearance was to be by a stranger, and not by the obligor himself.

* P. 374. * Dominus Rex *versus* Honora Munson & alios. *Error. Affises at Hereford.*

Oath.

T H E defendants were indicted for refusing the oath of obedience enjoined by 3 *Jac. cap.* 4. and the indictment was, that at the assises and general gaol-delivery held before Sir *Robert Atkins*, &c. and *Zachary Babington*, gent. *eidem Roberto Atkins and Timotheo Littleton, &c. hac vice associat. per sacramentum suum, &c. præsentat. existit modo sequen. viz. Jur. pro Domino Rege præsentant quod*, at the general quarter-sessions for the county of *Hereford*, 14 *January* 30. the justices of peace did tender the said oath to the defendants,

fendants, and they refused, and that afterwards *ad Affisas tent.*
pro Com. Hereford præd. 31 Martii 31 Car. 2. Coram Roberto
Atkins Milite Balnei un. Justic. dicti Domini Regis de Banco
& Zacharia Babington Gen. eidem Roberto Atkins & Timotheo
Littleton Mil. un. Baron. Scaccarii dicti Domini Regis ad Affisas
in Com. Hereford præd. capiend. assign. per formam Statut. the
 said justices *Atkins* and *Zachary Babington* again tendered the
 said oath, and they refused to take the same; and upon not
 guilty pleaded, the defendants afterwards, *relieta verifica-*
tione, confess the indictment; and judgment is given, that
 the defendants *ponantur & quilibet eorum ponatur extra protec-*
tion. dicti Domini Regis, & quod forisfaciant & quilibet eorum
forisfaciat dicto Domino Regi omnia bona & catalla terras & te-
nementa sua, and that they *committantur & quilibet eorum*
committatur Gaolæ dicti Domini Regis in Com. Hereford præd.
ibidem remansur. duran. beneplacito dicti Domini Regis, &c.
 Upon the writ of error, the error assigned was, that the se-
 cond tender of the oath was by the justices of assise only.
 Whereas the statute of 3 Jac. says, it must be by the jus-
 tices of assise and gaol-delivery, and this error seemed not
 to be allowed by my brother *Dolben*, but by the other two
 it was not spoke to. But I conceive 'tis error, and that the
 justices of assise cannot, by virtue of that commission barely,
 tender the said oath; for the statute says, that in case they
 shall refuse to take the said oath tendered them by the jus-
 tices of peace, then the said justices shall and may commit
 the same persons to the common gaol, there to remain with-
 out bail * or mainprise, until the next assises, where the
 said oath shall be again in the said open assises required
 of them by the said justices of assise and gaol-delivery in their
 open assises, every person so refusing shall incur the danger
 and penalty of *Præmunire*; by which it appears, that they
 being committed to gaol by judgment of the justices of peace,
 none can deliver them but they who have power to deliver
 the gaol. And though the statute *de Finibus, 27 E. 1.* gives
 justices of assise power to deliver the gaol, that is intended
 only of felons, as appears by *Stamf. Pla Cor. 57 and 58.* But
 the judgment was reversed for another error incurable, for
 misreciting the oath contained in the act; for whereas the
 oath in the act is, *and him and them will defend to the utter-*
most of my power against all conspiracy and attempts whatsoever,
 the indictment is, *against all conspiracies and contempts what-*
soever.

* P. 375.

Dominus

Term. Trin. 32 Car. 2. 1680. B. R.

Dominus Rex *versus* Pemlington. *Error. Chester*

Error.

THE indictment was for entering into the close of one Crew, and he was found guilty, and judgment, and fined 12*d.* and the error assigned is, because the first process is a *capias*; whereas in all indictments for trespass and under felony, a *venire facias* is the first process. And judgment was for this cause reversed.

Doddesworth, &c. *versus* Anderson.

Bankrupt,
1 Danv. Abr.
686. p. 1.
2 Jones 141.

THE case was upon a special promise. The question between the plaintiffs and defendant was, whether *William Grice* was a bankrupt before a conveyance by him made to the defendant and *Mary* his wife, dated 23 *Septem.* 23 *Car.* 2. And the jury find a special verdict.

That the said *William Grice* was a subject born of the king of *England*, and lived at *Dublin* in *Ireland*.

That before the making of the said conveyance he traded as a merchant at *Dublin*, and got his living by buying and selling.

That he frequently came into *England* and bought goods there, and sold them in *Ireland*, and became indebted to divers persons in divers sums of money as yet unpaid, exceeding 100 *l.*

* P. 376. * That he once did sell in *England* a parcel of neats tongues, and at another time in *Ireland* did sell a parcel of tallow to be delivered at *Chester* in *England*, which was done accordingly.

That he left his house and trade in *Dublin*, and there absconded from his creditors.

That he afterwards sojourned with a friend in *England*, and gave order to be denied, and absconded from his creditors in *England* before the making of the said conveyance.

That the said conveyance was made *bona fide*, and for valuable consideration, 23 *Octob.* 23 *Car.* 2. but dated 23 *Sept.* 25 *Car.* 2.

And upon this verdict we resolved, that *Grice* was a bankrupt before the conveyance; for though he is found to buy and sell but once in *England*, it is not necessary that he do so, for many merchants do only buy beyond sea and sell here, and others do only buy here and sell beyond sea; for 'tis trading that makes a person capable of being a bankrupt, and

Term. Trin. 32. Car. 2. 1680. B. R.

and 'tis plain that *Grice* did trade in *England*. And judgment was given accordingly.

Memorandum, June 18, 1680. Mr. *Nathaniel Redding* having been convicted (before justices of oyer and terminer by virtue of a special commission for that purpose granted) for endeavouring to persuade *Bulbin*, who was a witness against the noblemen imprisoned in the tower of *London*, to forbear his prosecution of them; and he the said Mr. *Redding* having had judgment executed upon him by being set in the pillory, and fined 1000 *l.* and imprisoned for the same, but his fine since pardoned by the king, came this day into court, and demanded that an information which he there brought in his hand might be received by Mr. *Astrey* against the commissioners who condemned him, of which my brother *Jones* and brother *Dalben* were two, and that the information may be filed. But the court did declare that he was in a wrong way to exhibit any information in this manner, and did cause his words, whereby he did accuse the two judges of oppression, to be recorded; and for those words, and for that he was infamous by having been on the pillory, the gentlemen at the bar did pray that his gown might be pulled over his ears (he having been formerly a practitioner at the bar) which was ordered and executed in court, and he was also condemned in court to pay the king 500 *l.* and to lie in prison till he paid it. He seemed to complain much for not being allowed a writ of error to reverse * his judgment before the commissioners; and afterwards the last day of this term he petitioned to be spared his fine, and there- (a) In this case one Marshall's case was cited, who was fined 1500 *l.* & afterwards in the same term reduced to 500 *l.* And though it be said, 1 Cr. 251. in Sir James Wingfield's case, that fines assessed in court by judgment upon an information cannot be afterwards qualified or mitigated, it is meant in another term, and not in the same term.

P. 377.

Co. Lit 260. a. (a)

Dominus Rex versus Ocullean. Middlesex.

AN indictment, that the defendant born within the Priest-king's dominions, being a priest, and ordained by authority from the see of *Rome*, 28 Febr. 31 Car. 2. *infra hoc Regnum Angliæ, scilicet* at the parish of *St. Margaret's Westminster*, proditorie & ut falsus proditor dicti Domini Regis nunc fuit & remansit contra formam statut. in hujusmodi casu edit.

Term. Trin 32 Car. 2. 1680. B. R.

edit. & provis. Et contra pacem, &c. upon not guilty, the jury find a special verdict.

That the said defendant was born in *Ireland*, within the king's dominions.

That he is *sacerdos factus & ordinat. per autoritat.* derived from the see of *Rome* before 28 Febr. 31 Car. 2.

That on the said 28 Febr. 31 Car. 2. the defendant in a certain ship sailing from *Bourdeaux*, in the dominion of the king of *France*, towards *Corke* in *Ireland* by tempest *coactus fuit*, *Anglicæ* was driven, into *Minchhead* in *Somersetshire*, and there immediately *pro alta prodicione præd. capt. & apprehensus fuit.* Sed *utrum super tota materia* the defendant be guilty or no, *petunt advisamentum Cur.* And I conceive upon this verdict, the defendant is not guilty, for these reasons.

1. From the preamble of the act of 27 Eliz. cap. 2. which says, *that whereas divers persons called jesuits, seminary priests, and other priests, have of late years come and been sent, and daily do come and are sent into England to withdraw the subjects from their obedience, &c.* Now this man neither came nor was sent, properly speaking, but *coactus fuit* into *Minchhead*.

2. The clause which prohibits priests to come into or remain, reaches not here, because it is said that he was,
• P. 378. • immediately after his being driven a-shore, taken, and so cannot be said to remain.

3. There is the act of God in the case, which is *summa necessitas*, of which all laws, both human and divine, allow. And in this act it is said in the clause, which enjoins priests to depart, if the wind, weather and passage shall serve for the same; and so the clause which preserves liberty, who cannot go for infirmity.

4. *Actus non facit reum, nisi mens sit rea.*

As to that clause in the indictment, *that he was going into the king's dominions, viz. Ireland.*

Resp. Nil efficit conatus, nisi sortitur effectu. And with my opinion agreed the whole court. And judgment was given for the defendant.

Dominus Rex versus Alsop. Verb. Error.

Game.
3 Keb. 516.

THE defendant was indicted at the quarter-sessions, that he *non habens terras tenementa feod. annuitat. reddit. vel officia in jure suo proprio vel in jure uxor. ejus ad usum suum*

*suum propr. nec aliqua alia persona sive aliquæ aliæ personæ ad usum ipsius Thomæ vel uxor. ejus vel ad usum eorum alterius annui valor. 100l. 9 die Novemb. 31 Car. 2. apud Boylstin Sagittavit in quodam tormento, Anglice vocat. a Handgun, contra formam Statut. in hujusmodi casu edit. Et provis. ac contra pacem dicti D'ni Regis nunc Coron. Et Dignitat. suas. The defendant pleads not guilty, and found guilty; and judgment is entered thus: Ideo consideratum est per Cur. dicti D'ni Regis nunc hic quod præd. Thomas Alsop solvet dicto D'no Regi secund. formam Statut. in hujusmodi casu edit. Et provis. decem librar. pro fine suo super ipsum occasione præd. imposuit. Et quod præd. Thomas Alsop capiatur ad satisfaciend. D'no Regi le fine præd., &c. The defendant assigns the general error. But the errors insisted upon were these. 1. *Non habens terr.* refers to the time of the indictment, and not the shooting; and so he may have 100l. per annum when he did shoot, and may have parted with it at the time of the indictment, as 3 Cro. 754. *Stansbie's case.* An indictment of forcible entry into lands *existen. liberum tenementum* of the party, is not good, for not saying *ad tunc existen.* 2. The judgment is *solvet* for *solvat.* 3. *Decem librarum* for *decem libras*; and for these reasons judgment was reversed.*

* Sir John Sparrow *versus* Draper. London. * P. 379.

DE B T for rent. The defendant pleads in abatement, Repleader. *quod præd. Johannes Sparrow in billa præd. nominat. est die exhibitionis billæ præd. fuit miles prout per billam præd. superius supponitur Et hoc &c. unde petit judicium de billa &c.* The plaintiff replies, that the plaintiff is, and at the time of exhibiting the bill, was a knight, and tenders issue to be tried *per patriam.* The defendant demurs, because this issue ought to be tried by the king at arms. But resolved, that the issue ought to be tried *per patriam*; for *Co. Lit. 74. a.* says there are but six kinds of certificates, and this by the king at arms is none of them; and this issue is triable either by certificate or *per patriam.* And this very issue was tried *per patriam Mich. 7 H. 16. 15. a. pl. 101.* In *Qu. Imp.* The defendant pleads, that the plaintiff *apres le darreine Continuance* was knighted; and the plaintiff denies it, and issue thereupon, and tried *per patriam.* And judgment was in the principal case, that the defendant *respondeat ouster.*

Dominus

Dominus Rex versus Count de Castlemain.

Witness.

* P. 380.

THE earl of *Castlemain* was indicted by the name of *Roger Palmer* esq; earl of *Castlemain* in the kingdom of Ireland, for that he traiterously intending to kill the king, to introduce the Romish religion, and to subvert the government, 20 June 30 Car. 2. at the parish of St. Giles in the fields, together with other false traitors, did unite and gather themselves together, and did consult to put the king to death, to depose him from his crown and government, and to introduce the Romish religion, and to that purpose did promise great rewards; and pay divers sums of money to divers persons unknown; and that he did write divers notes in writing to incite divers other persons to compleat the treasons aforesaid, *contra pacem & contra formam statuti*. Upon not guilty pleaded, the defendant having been a prisoner in the tower for some time, was the twenty-third of June 1680. tried at the bar. There were only two witnesses who offered materially to depose against him, and they * did depose very positively against him as to his attempting to procure some to kill the king, the witnesses were doctor *Titus Oates*, and one *Thomas Dangerfield*. Upon the evidence of *Dangerfield*, who had been found guilty upon several indictments, one of felony, for which he had his clergy, and was burnt in the hand; upon other indictments he had been upon the pillory for cheating but had obtained his pardon under the great seal for all the said offences; a question did arise whether he might be a witness, and thereupon the prisoner did desire to have counsel assigned him, and it was granted; and Mr. *Daniel*, one of his counsel, urged, that *Dangerfield* ought not to be a witness, for that he was blemished, and the pardon had not restored him to his testimony; and cited 2 *Brownlow* 47. where it is said that the king pardoned a man attaint, for giving a false verdict, yet he shall not be at another time impanelled upon any jury; for though the punishment were pardoned, yet the guilt remains. 2 *Bulstr.* 154. *Brown* versus *Crasbaw*. In a prohibition, the suggestion was proved only by two persons attainted of felony. And *Coke* chief justice cited *Hill.* 11 H. 4. 41. b. pl. 7. That if a man be attainted of felony and pardoned, he shall not afterwards be sworn upon a jury, because he is not *probus & legalis homo*. But the court willing to be thoroughly satisfied, sent

sent
nions
the b
the
pardon
But
pardon
cause
quent
and t
with
to the
a. H
Wilke
of op
judgm
whole

*
beas
peach
reason
years
treaso
de ju
in disc
ders o
which

It
petiti
the la
is ord
assemb
comm
their
lords
clock

Th
appoin
ments

Term. Trin. 32 Car. 2. 1680. B. R.

sent me to the court of common pleas to know their opinions in this point. And the judges there resolved, That the burning of the hand was *quasi* a statute pardon, as to the felony: and as to that he was a good witness, and the pardon made him a good witness as to the other offences. But they said, That had he not been burnt in the hand, the pardon would not have restored him to his credit again, because in his testimony the people are concerned, and consequently the pardon will not deprive them of their interest, and thereupon we allowed him to be a good witness; and with the opinion of the judges of the common pleas, as to the burning of the hand agree the books of 5 Co. 110, *a. Heston's case*; and *Hob. 292.* and 67. *Cuddington and Wilkin's case*; but *Moor 872.* says, that justice *Nichols* was of opinion, That if the plaintiff had been convicted, the judgment would have been otherwise. And upon the whole evidence, the defendant was found Not guilty.

* *Memorandum*, The lord viscount *Stafford*, upon a *Habeas Corpus* from the tower, desired to be bailed, being impeached in parliament by the house of commons, and by reason thereof had lain in prison in the tower almost two years; but we did resolve, That a person accused of high treason, and not within the act for *Habeas Corpus's*, is not *de jure* to be bailed by this court, and we did not think fit in discretion to bail him; and we alledged likewise the orders of the house of lords, though we did not rely thereon, which are as followeth, *viz.* * P. 381. Bail.

Die Martis 11 Martii 1678.

It being moved, that this house would declare whether petitions of appeal which were presented to this house in the last parliament be still in force to be proceeded on, It is ordered by the lords spiritual and temporal in parliament assembled, that it be, and is hereby referred to the lords committees for privileges to consider thereof, and report their opinion thereupon unto this house, and that the said lords committees do meet on *Thursday* next at three of the clock in the afternoon for that purpose.

Die Mercurii 12 Martii 1679.

The earl of *Shaftsbury* reported, That the committee appointed yesterday to consider in what state the impeachments in the last parliament now stand, have perused the journal

Journal of this house, and find that the fifth day of *December* 1678. the impeachments against the five lords now prisoners in the tower were brought from the house of commons, which consisted of a general charge of treason, and other high crimes. The house of commons declaring they would in convenient time exhibit the articles of their charge them. The next day this house appointed to go upon the consideration of these impeachments, and all the judges were appointed to be then present, but nothing was done thereon.

The lords committees do also find that an impeachment of high treason, and other high crimes against *Thomas* earl of *Danby* lord treasurer, was brought from the house of commons the twenty-third day of *December* 1678. and the particular articles then exhibited, and the commons desired that he might be sequestered from his place in parliament, and committed to safe custody.

- P. 382. • That the lord treasurer desired copies of all papers and proceedings concerning this business, and that it was then resolved upon the question, that the lord treasurer should not then withdraw.

It farther appears, That on the twenty-sixth of *December* 1678. the lord treasurer moved the house for a copy of his charge; and that he might not lie long under it; whereupon it was moved that the house would consider of the desire of the house of commons concerning his confinement.

The debate was adjourned.

It appears that this house on the twenty-seventh of *December*, resolved, That the lord treasurer should not now be confined; and ordered, That he should have a copy of the articles, to which he was appointed to bring in his answer before the third day of *January*, and that he might have counsel to assist him.

Upon report made by the earl of *Shaftsbury* from the lords committees for examination of the late horrid conspiracy concerning the impeachments brought up from the house of commons in the last parliament, how they stand entered in the journal of this house,

It is ordered, That it be, and is hereby referred to the lords committees for privileges, to consider of the state of the said impeachments, and all the incidents relating thereunto, and report their opinion thereupon unto this house.

Term. Trin. 32 Car. 2. 1680. B. R.

Die Lunæ 17 Martii 1673.

Ordered by the lords spiritual and temporal in parliament assembled, That it be, and is hereby referred to the lords committees for privileges, to consider whether petitions of appeal which were presented to this house in the last parliament be still in force to be proceeded on, as also to consider of the state of the impeachments brought up from the house of commons last parliament, and all the incidents relating thereunto, and make report thereof unto the house.

Die Martis 18 Martii 1673.

The earl of *Essex* reported, That the lords committees for privileges, in obedience to the order of this house dated the seventeenth of this instant *March*, have considered of the matters referred to them, whether petitions of appeals which were presented to this house in the last parliament be still in force to be proceeded in; as also to consider of the state of the impeachment brought up from the house of commons last parliament, and all the incidents relating thereunto, and make report thereof unto the house; and their lordships upon perusal of the judgment of this house, of the twenty-ninth of *March* 1673. are of opinion, That in all cases of appeals and writs of error they continue, and are to be proceeded on *in statu quo* as they stood at the dissolution of the last parliament, without beginning *de novo*.

P. 383.

The judgment and proceedings being large, are omitted to be reported, the journal of this house being ready, wherein that judgment is entered.

And upon consideration had of the matter referred to their lordships concerning the state of the impeachments brought up from the house of commons the last parliament, and all the incidents relating thereunto, their lordships find, that the five lords who are in the tower are upon general impeachments, and the other lord is impeached with special matter assigned, they refer the house to the report made the 12th of *March* instant, which states what is entered in the journal of the last parliament concerning this matter; and their lordships are of opinion, That the dissolution of the last parliament doth not alter the state of the impeachments brought up by the commons in that parliament.

A a

Die

Term. Trin. 32 Car. 2. 1680. B. R.

Die Mercurii 19 Martii 16⁸⁰.

Next the house entered into consideration of the report from the lords committees for privileges, whether petitions of appeal which were presented the last parliament be still in force to be proceeded in; and concerning the state of impeachments brought from the house of commons the last parliament, and all the incidents relating thereunto; and in the midst of the debate the earl of *Lincoln* came into the house, and took the oaths of allegiance and supremacy, and made and subscribed the declaration in pursuance of the act for the more effectual preserving the king's person and government by disabling papists from sitting in either house of parliament.

* P. 384. After this the house proceeded in the debate aforesaid, and after some time spent therein, it was desired that this question might be put, Whether to agree with the committee in this * report? Then this present question was put, Whether this question shall be now put? And it was resolved in the affirmative.

Then the main question was put, Whether to agree with the committee in this report? And it was resolved in the affirmative.

The house this day taking into consideration the report made from the lords committees for privileges, that in pursuance of the order of the seventeenth instant to them directed for considering whether petitions of appeal which were presented to this house in the last parliament be still in force to be proceeded on, and for considering of the state of the impeachments brought up from the house of commons the last parliament, and all the incidents relating thereunto, upon which the lords committees were of opinion, That in all cases of appeals and writs of error they continue and are to be proceeded on *in statu quo*, as they stood at the dissolution of the last parliament, without being *de novo*, and that the dissolution of the last parliament doth not alter the state of the impeachments brought up by the commons in that parliament. After some time spent in consideration thereof,

It is resolved by the lords spiritual and temporal in parliament assembled, That this house agrees with the lords committees in the said report.

Dominus

Term. Trin. 32 Car. 2. 1680. B. R.

Dominus Rex *versus* The Inhabitants of the County
of Essex.

AN information for not repairing a certain common ^{Ways.}
stone-bridge commonly called *Daggenham Bridge*, alias ^{Trem. 208.}
Daggenham Beam, situate lying and being in *separalibus Pa-*
rochiis de Hornechurch & Daggenham in the same county in
Communi alta Regia via ducen' a Paroch. de Raynham in Com.
præd. usq; Paroch. de Daggenham præd. in Com. præd. & sic
vers. Civitat London. The defendants plead, That they
ought to be charged with the repairing of the said bridge,
for that by an inquisition taken at *Chelmesford* 3 Aug. 26
Car. 2. before sir *Matthew Hale* knight, chief justice of B.
R. and justice *Twisden* and others, justices of oyer and
terminer, it was presented, That a certain common bridge
commonly called *Daggenham-Beam*, *jacen. & existen. in Pa-*
rochia de Daggenham in Com. Essex præd. in communi alta
Regia via ibidem ducen. a Daggenham præd. in Com. præd. ad
*Vill. de Raynham in eodem * Com.* was then in decay and out * P. 385
of repair, and that sir *Norton Knatchbull*, bart. and sir *Tho-*
mas Fanshawe, knt. by reason of the tenure of lands in the
parish of *Barking*, and elsewhere in the said county, late
the lands of the abbess of the abbey of *Barking*, ought to
repair the same, and thereupon a *Venire fac'* issued against
the said sir *Norton* and sir *Thomas*; and 10 July 28 Car. 2.
before justice *Jones* and other commissioners of oyer and
terminer, and the said sir *Thomas* came and pleaded that he
ought not to repair the said bridge by reason of the said te-
nure, but that the inhabitants of *Daggenham* ought to repair
the same, and thereupon a trial was had 12 March 29 Car.
2. and found that the said sir *Thomas* ought to repair the said
bridge *modo & forma prout, &c.* and judgment against him
to the king for 20*l.* and then avers that this and that are the
same bridge, and that the said judgment continues still in
force, and not reversed; and upon this plea the king's at-
torney demurred, because the bridge contained in the infor-
mation is in two parishes, and the bridge in the plea lies but
in one, and so cannot be the same; and so was the opinion
of the court, for sir *Thomas Fanshawe* may be tied to repair
so much of the bridge as is in *Daggenham*, and the coun-
try the other part. And judgment was given for the king.

Term. Trin. 32 Car. 2. 1680. B. R.

Dominus Rex versus John Bishop, Civitas Oxon.

Trade.

THE defendant is indicted before the justices of peace of the city of Oxon by the name of *John Bishop de Civitate Oxon præd. Millener* 5 October 29 Car. 2. & multis aliis diebus & vicibus continue post præd. quantum diem Octobris for three months and more, viz. to the taking of the inquisition, did use, exercise and occupy unlawfully, & pro lucro suo propr. artem mysterium sive manulem occupation. venditoris, Anglice of a Salesman, existen. artem mysterium sive manual. occupation. usitat. infra hoc Regnum Angliæ 12 die Januarii 5 El. eodem Johanne Bishop nunquam existen. in dicta arte mysterio sive manuali occupation. edurat. as an apprentice for the space of seven years. Upon a demurrer to the indictment, the sole question was, Whether a salesman was within the statute of 5 Eliz. because it seemed to be a new trade. But resolved it was a trade then used, and so with in the statute.

• P. 386. • *Dominus Rex versus William Tempest & auters. Dunelm.*

Error.

TEMPEST, Scot, and others were convicted of a riot in the county of Durham, upon the view of *John Morland* and *William Blackston*, esq; two justices of peace, and *Nicholas Conyers*, esq; sheriff of the said county, of a riot, contra formam Statuti de 13 H. 4. cap. 7. and they were fined by the justices, viz. *Tempest* 20l. and the rest 5l. a-piece, but the sheriffs did not join in setting the fine; and the defendants bring a writ of error, and assign for errors, 1. It doth not appear that the defendants were convicted by the view of the justices. 2. The sheriff did not join in the fining them; and the statute says, That the sheriff is to be joined with the justices in the whole proceeding; and for these errors the judgment was reversed.

Woodroffe versus Margaret Wilgrefs.

Loy Gager.

DEBT for 4l. recovered in a court-baron for damages and costs recovered in a court-baron, in an action brought there for words. The defendant offered to wage her law, and came to the bar, and brought her compurgators with her, and she was ready to swear, and she laid her hand on the book, and began to swear; but upon the court's

Term. Trin. 32 Car. 2. 1680. B. R.

court's demanding what the cause of action was, and finding it to be aforesaid, we asked her if she had paid the monies recovered, and she answered, that she owed the plaintiff nothing; but she not affirming that she had paid it, and it being an apparent debt by the recovery, we asked some of the compurgators whether they believed she would swear true in this case? And they believing she could not, we deferred taking her oath till next day, and then she offered to pay the money, so as she might be abated the costs. And it seemed clear, that though wager of law doth lie of a debt recovered in a court-baron, yet that shall be intended of a debt originally sued for there; *tamen Quare*, for I am in doubt how that will differ from the case at bar, only in the case at bar wager of law would not have been upon the original action, because there is an injury supposed in the * defendant, in which case wager of law lies not, *Co. 295. a.* and therefore though it be in a recovery in a court baron, yet because the original cause of the action will not permit *Ley Gage*, I think we did well in refusing her waging of law. *Vide March 15. pl. 35. Moor 276. pl. 430.* * P. 387.

Philip Brogan *versus* John Auger, Clerk. *Error in Ireland. Attachment upon a Prohibition.*

Intr. Hill. 30 & 31 Car. 2.

THE plaintiff declares, That one *Cornelius Duffe*, late prior of the hospital of St. John's by Kells in the county of Meath, 1 January 33 H. 8. being seised of the said hospital and priory, and of the rectory impropriate of the parochial church of *Duroagh*, alias *Darvy*, in the counties of *Meath* and *Cavan*, and of the tithes of the eleven pole lands of *Bally-Bruise* lying in the parish of *Darvy*, and of all tithes in the said parish in fee, that he and all his predecessors, &c. had and received time out of mind, for the use of the said hospital, tithes of the said lands called *Bally-Bruise*, within the said parish of *Darvy*, That all the said hospital and rectory came to king *Henry* the eighth, by a statute made in *Ireland*, 15 Febr. 33 H. 8. cap. 5. and from king *Henry* the eighth they descended to *Edward* the sixth, from him to queen *Mary*, from her to *Elizabeth*, from her to king *James*, who granted them to *Medhop*, who sold them to *Crow* and others, who sold them to *James* bishop of *Meath*, and sir *William Usber*, who granted them to sir *Robert Forth* and his heirs, and from him they descended

Damages.
2 Jones 128.
1 Vent. 348,
350.
2 Show. 56,
88.

scended to *John Forth* his son and heir, who sold the same to *Thomas Taylor* and his heirs for 725*l.* and that the plaintiff as his bailiff gathered the tithes of four pole, part of the eleven pole lands of *Bally Bruise*; and the defendant as rector of the parish of *Lurgan* in the diocese of *Kilmore*, sues the plaintiff in the ecclesiastical court for the tithes of those four pole lands, pretending that they lie within the parish of *Lurgan*, whereas they lie within the parish of *Daroy*; and the right and limits of parishes is to be determined at common law, *ad damnum* 100*l.*

Judgment was entered by default; and upon a writ of enquiry of damages, the jury found 100*l.* damages and * P. 388. * 6*d.* costs; and judgment was given for the 100*l.* and 28*l.* 5*s.* *de iuramento*, for damages and costs. The errors assigned upon the record, was only the general error. But the counsel insisted upon these;

1. The writ of enquiry finds 100*l.* damage, and 6*d.* costs, and there is no notice taken in the judgment of the 6*d.* costs; *sed non allocatur*.

2. There is no *Visne* laid where the suit in the ecclesiastical court was; so that if the defendant had pleaded *Non profecutus fuit* after the writ of prohibition delivered, and issue had been taken thereon, there could have been no trial. To this exception was answered, That all or most of the precedents are so; and the *Visne* is never alledged in such case. But upon examination I find these precedents to the contrary, *viz.* where there is a *Visne* alledged in such case, *viz.*

Hob. 306. Wright versus Gerard, The record whereof is *Winch. Intr. 642.*

Co. Intr. 456. and Co. 2. 46. The archbishop of *Canterbury's* case.

2 *Co. 41. b.* The bishop of *Winchester's* case.

Rastal's Intr. 485. Tit. Prohibition in Debt. 3, 4, 5, 6, 7, and 488, 489. In Dismes 3, 6. In Trespass 2. Plow. 468. b. Soby versus Molyns.

2 *Brownl. Intr. 236. Dowse versus Gooch 239. Hawkes versus Parkman.*

Formulae bene placitandi 1. 303, 314. 2. 187. Mayhus versus Green, upon a *Modus Decimandi* 190. *Banks versus Betty pro Dismes in London.*

Liber placitandi 229 and 242. al Court de Requets 237. pro subtractione tabulae ab Ecclesia 238. de modo decimandi 245. pur suant in le Marches de Wales.

And I find this difference, *viz.* Where damages are given for the plaintiff, there generally he lays a *Visne* where the
suit

Term. Trin. 32 Car. 2. 1680. B. R.

seit in the ecclesiastical court was; but otherwise the want of a *Vifne* hurts not. And judgment was reversed for this reason by the opinion of the whole court.

• Thomas Ryder *versus* Richard Hill. London. • P. 389.

DEBT for rent upon a lease parol. The defendant Discontinu-
pleads, that the plaintiff *nihil habuit in tenementis tem-* auct.
poris dimissionis. The plaintiff replies, that 19 Febr. 1656.
John lord St. John of Basing, marquis of Winchester, was
seised in fee, and so being seised, by indenture then dated,
for money bargained and sold, and William Owen, Luke
Crosley and Thomas Henslow confirmed to one Richard Nor-
ton, esq; for ninety-nine years, 1 March 29 Car. 2. The
estate of the said Richard Norton by several mesne convey-
ances came to the plaintiff, by virtue whereof he became
possessed, and demised to the defendant as is aforesaid. The
defendant demurs, because the plaintiff doth not shew how
he comes to the term. And it was adjudged for the plain-
tiff, that upon the trial the plaintiff may set forth all at
large, and he shall not be compelled to lengthen the record
by setting forth every deed. Mich. 18 Car. 2. B. R. *Cotes*
versus Wade, ante fol. 74. b. True it is, that 3 Cro. 22.
pl. 5. seems contrary; but ante 55. b. agrees with this judg-
ment. Mich. 1653. B. R. *Elston versus Drake*. In debt for
rent, the case was, The plaintiff as administrator declares,
quod cum le Intestate demise al Defendant certain terre, render-
ing rent to him, his executors and assigns, the defendant
had not paid to the plaintiff, *unde actio accrevit*, &c. The
defendant pleads *non detinet*, and found for the plaintiff; and
it was moved in arrest of judgment, because the plaintiff
doth not shew of what estate the intestate was seised or
possessed; for if of an estate in fee, then the rent ceases by
his death, and the words *per quod actio accrevit* will not help,
though after a verdict, for the conclusion is not put to a
jury, and action may accrue to administrator, though the
intestate was seised in fee, for if the rent was in arrear in
his life-time, the administrator may sue for it. On the
other side for the plaintiff it was urged, that it being after a
verdict, and being an equal doubt, the best shall be taken
for support of the verdict; and the jury have found, *quod*
detinet, and 'tis impossible that the defendant should *detinere*,
if the plaintiff had not cause of action. There was no
judgment in this case of *Elston* and *Drake*, because the par-
ties agreed to go to a new trial. But the whole court were
of

* P. 390. of opinion for * the defendant, but gave the plaintiff leave to discontinue, paying costs.

Mustard *versus* Harnden. Error C. B. Case. Essex.

Error.

THE plaintiff, *James Mustard*, declares that he was possessed of a hoy called the *Mary*, loaded with diverse goods and chattels, and floating at anchor in the river of *Thames*, within the parish of *West Thurrock*, in a convenient place of the same river; and that the defendant *Thomas Harnden satis sciens*, the said 17 May 30 Car. 2. being master of the ship called the *Hound*, and then sailing in the said ship, in the said river towards the city of *London*, did govern the said ship so negligently and improvidently, that she sailing in the said river in *prædictam naviculam ipsius* the plaintiff to floating at anchor, as aforesaid, *violenter ruebat, & naviculam illam ut præfertur onerat fregit & submersit, ad damnum 200l.* The defendant pleads Not guilty. The jury said, that *quoad negligent. & improvidam gubernation. navis infra nominant' vocat' le Hound navigan. in Riwo Thamesis infra script. per quod eadem navis in rivo præd. ut præfertur navigans in naviculam præfat. le Plaintiff in rivo præd. ad Anchoram fluctuan. violent. ruebat & naviculam ill. fregit & submersit*, the defendant is guilty, and assess damages to 50*l.* Et *quoad resid. de præmissis*, Not guilty, and judgment accordingly; and the error assigned was, that there was no *Residuum* to find the defendant Not guilty; for the first part of the verdict comprehends all the injury complained of in the declaration, and then the judgment, that the plaintiff shall be in *misericordia pro falsa clamore*, as to the *Residuum* is not good; and of this opinion was the whole court, though the objection was, that it might be that the *Residuum* might be intended the *satis sciens*; but that was not allowed of, nor the goods with which the hoy was loaded; and so judgment was reversed.

* P. 391.

* Obeden *versus* Keynel. Dorset.

Recusancy.
2 Jon. 187.
2 Show. 179.
Postea 465.

DEBT upon 23 *Eliz. cap. 1.* for not coming to church. At the trial, after the jury sworn, and before verdict given, the defendant came into the court, and did there submit, recognize, confess and acknowledge, that he had offended and done ill in not going to church, and not conforming himself to the law therein, and did then prove that he

he had conformed himself since the suit brought by going to church, receiving the sacrament, and behaving himself orderly and soberly during all the time of divine service, according to the law; and did then and there promise and engage to conform, and go to church, and there to behave himself soberly and orderly, according to the law; and that the said defendant was never indicted or prosecuted for any offence of this nature before.

This is an action for 20*l*. a month for not coming to church, tried the last assizes in *Dorset*, and a verdict for the plaintiff for 40*l*. At the trial the defendant comes into court and conforms, and makes the above written recognition; Whether that doth discharge the action and verdict, or no, is the question?

It was objected, that in the action *tam quam* the plaintiff hath an interest which shall not be divested within the intent of the clause in 23 *Eliz. cap. 1.* the words whereof are, Every person guilty of any offence against the statute (other than treason and misprision of treason) which shall before he be thereof indicted, or at his arraignment or trial before judgment, submit and conform himself before the bishop of the diocese, where he shall be resident, or before the justices where he shall be indicted, arraigned or tried (having not before made like submission at any his trial, being indicted for his first like offence) shall, upon his recognition of such submission in open assizes or sessions of the county, where such person shall be resident, be discharged of all and every the said offences against this act (except treason and misprision of treason) and of all pains and forfeitures for the same; for that this clause refers only to such cases where the party is arraigned or indicted, and not to actions.

But it seems that the words shall be taken distributively at his arraignment, or trial before judgment, *i. e.* arraignment in case of indictment, and trial in all cases. But no resolution was given, but adjourned to farther consideration. *Vide 2 Bulstr. 324.* The king and *Shoile* versus *Foster*, The statute of 29 *Eliz.* pardons all penalties of one conforming, except what is converted into one debt. *1 Roll. Rep. 94. Post.*

P. 392.

Thomas.

Term. Trin. 32 Car. 2. 1680. B. R.

Thomas Horton, Etq; *versus* Nanfan & al'. *London.* Error in C. B.

Error.

AN action in nature of a ravishment of ward by guardian in socage. The plaintiff declares, that *William Finch* was seised of lands in *Kent*, *Cambridgeshire* and *Hertfordshire*, in fee, held in socage, and died without issue, by reason whereof the said lands descended to his five sisters and co-heirs, all under the age of fourteen, and that he is next of kin to them, viz. brother to their mother. The defendant pleads, that the said *William Finch* was tenant in tail, the reversion in fee in the defendants; *absque hoc*, that he was seised of the said lands *modo & forma prout* the plaintiff hath declared; and issue thereupon, and tried in *London* where the action is laid, and found for the plaintiff, and damages 400 *l.* and judgment thereupon; and the error insisted was, that the seisin of lands in *Kent*, and other counties, is tried in *London*. But the court seemed to incline that it is well enough after a verdict, by the statute of 16 & 17 Car. 2. cap. 8. which is continued 22 & 23 Car. 2. cap. 4. *Sed adjournatur.*

Cartledge versus Mawdlin. Covenant. Southampton.
Intr. Mich. 31 Car. 2.

Common.

THE plaintiff declares upon articles intended, dat. 10 Nov. 22 Car. 2. between all the tenants, as well copyholders and inhabitants, and others, within the tithing of *Ramsdean* and *Langrish*, within the manor of *Meon* in the said county of *Southampton*, for the better regulating, ordering, governing, ascertaining and stinting all such cattle as afterwards should be kept in and upon the common and waste-ground called the *strood* and *sheet commons* within the

* P. 393. * said manor, from time to time, thenceforth for ever; whereby it was agreed between them (amongst whom the plaintiff and defendant were two) mutually, that no tenant or any other person claiming in, from or under him or them from thenceforth should keep or put out into the said commons, or either of them, after the 15th of *May* then next following, any number of beasts, but only such as by the same articles were expressed, limited and appointed, viz. The defendant three, &c. The plaintiff in fact says, that the defendant kept and put in 15 *March* 31 Car. 2. and

Term. Trin. 32 Car. 2. 1680. B. R.

and so to 1 May 32 Car. 2. four beasts, *contra formam Articulorum predicti*. by reason whereof the plaintiff could not have so large common as he ought to have by virtue of the said articles. The defendant pleads *assio non*, because before the exhibiting the said bill, and after the said articles, viz. 9 April 28 Car. 2. the plaintiff and one William Baker by their writing then dated, remised, released, and for ever quit-claimed to the defendant, his heirs, executors and administrators, all and all manner of actions and causes of action, *Secus, Billas, Obligation, Scripta Obligatoria*, debts, dues, duties, accounts, sum and sums of money, judgments, executions, quarrels, controversies, trespasses, damages and demands whatsoever, as well in law as in equity, or any other ways or means whatsoever, which they the said plaintiff, and William Baker, or either of them ever had, or then had or might have for or by reason or means of any matter, cause or thing from the beginning of the world to the day of the said release. To this the plaintiff demurs, and the question is, whether any of the words in the release will discharge these articles? And the most material for this purpose is, the word *Scripta Obligatoria*, which *ex vi termini*, is any writing under seal; but according to the usual acceptance is bonds: but here it should signify something more, because the word *obligations* is also in the releases. But my brother Jones said, that writings made by scriveners very often, and for the most part, do contain divers words, which signify the same thing, to fill up the instrument, and to enlarge the reckoning; and so in this place; and of the same opinion seemed my lord chief justice and Dolben to be. And I added, that I conceive it was never the intent of the parties, that the plaintiff should release this agreement; for why should he join another in the same deed of release, who was not party (for aught appears by the record) to the said agreement? And 2dly, there would have been some notice taken of the common, had it been intended that the same should have been included in the release, and therefore the whole court inclined, that judgment should be given for the plaintiff.

P. 394.

Pheasant *versus* Finch. *Essex.*

Intr. Hill. 31 & 32 Car. 2.

DEBT for 200*l*. The plaintiff declares, that the defendant for eleven months together next before the

Qui tam.

20th

20th of October 31 Car. 2. being above the age of sixteen, and inhabiting at *Halfstead*, did not go to church, contrary to the form of the statute. The defendant demurs generally, and the sole question is, whether this suit may be commenced in this court, notwithstanding the statute of 21 Jac. cap. 4. The lord *Coke* 3 Inst. 194. says, that the informer cannot inform for this offence, or any other offence therein excepted, in any of the courts at *Westminster*, but before the justices appointed by the act, because the clause of excepting them out of the act, extends only for the laying or alledging any of those offences in any county that he will. But to me it seems, 1. That the words of the act are, that all offences hereafter to be committed against any penal statute, for which any common informer may lawfully ground any popular action, bill, plaint, suit, &c. before justices of assize, nisi prius, gaol-delivery, oyer and terminer, or justices of peace, shall be commenced, sued, prosecuted, tried, recovered and determined by way of action, plaint, bill, information or indictment before the said justices of Assize, &c. having power to inquire of, hear and determine the same, &c. and not elsewhere; by which it seems that if they cannot determine the same, or that such actions will not lie before them, then they are to be determined, where such jurisdiction is given by the law. Now the statute of 23 Eliz. cap. 1. gives remedy by action of debt, bill, information or plaint, &c. And an action of debt cannot be commenced before the justices of assize, &c. either by writ or bill, and consequently it will not be within this statute of 21 Jac. Et adjourn. And Mich. 32 Car. 2. adjudged for the plaintiff; and many precedents were produced of informations in C. B. and this court, for the penalty.

* P. 395. * *Durnford versus Irish. Error in Marleborough.*

Error.

INDEBITATUS *assumpsit*; the error insisted on was, that the court is said to be held *coram Majore & Burgensibus Burgi præd. secundum consuetudinem ejusdem Burgi, & tempore quo, &c.* And the name of the mayor is not mentioned, which ought to be, 2 Cro. 184. *Ferrat versus Culderwel*, there was a writ of error of a judgment in *Burton upon Trent*, and said, *Coram Senescallo & Ballivo Domini Paget*, and shewed not their names, and held to be an incurable error, and seems a good exception. But it was adjourned; and after judgment was reversed.

Cutforthay

Term. Trin. 32 Car. 2. 1680. B. R.

Cutforthay versus Taylor. Nott.

TRESPASS *vi & armis* for taking the mare *ipsum Que-* Error.
ren. necnon bona & catalla sequen. viz. and sums them up, 3 Danv. Ab.
but doth not say they were the goods *ipsum Quer.* And 78. p. 11.
thereupon the defendant demurs; and resolved the plaintiff
may have judgment for the mare, and release the action
for the residue; and it was said, there are precedents of
such judgment, but I can find none. *Vide 2 Cro. 104.*
Woodhouse's case upon the statute of 37 H. 8. cap. 9. upon
an usurious contract. 1 Cro. 512. *Mulcany versus Eyres.*
Ejectment for one hundred acres of bog, and other things;
the plaintiff released his demand to that, and took judgment
for the residue.

Walsal versus Mary Allen.

ACTION on the case for words. The plaintiff de- Words.
clares, that he being a clergyman, the defendant said A plea in bar
of him these words, *viz. Francis Walsal is a thief, and he held good*
stole plate from Maudlin College in Oxford; and I bought though itought
plate of one in Oxford, and gave it to the college for that plate, to have been
and thereby saved him from being hanged, ad damnum 500 l. in abatement.
The defendant pleads in bar by attorney, that *ante diem, sci-*
licet 1 Julii 12 Car. 2. the plaintiff married the defendant,
and thereupon the plaintiff demurred; and adjudged for the
defendant, though pleaded in bar.

* Nappier & al. versus Curtis & al. In Trespass. * P. 396.
Hill. 31 & 32 Car. 2. Rot. 20.

THE plaintiff declares, that the defendants 8 August 30
Car. 2. *vi & armis* did break the plaintiff's close called
Worgret common within the parish of St. Michael in Wareham,
and spoiled the grass *ad valentiam 40 l. pedibus ambulando,*
and other grass of the plaintiff's *cum quibusdam averiis, viz.*
Equis, &c. Necnon cum carucis plaustris & aliis Carriagiis suis
aliam herbam & solum clausi præd. depresser. subverter. & spolia-
ver. and in the said close did dig tobacco-pipe clay, and car-
ried away two thousand loads thereof to the value of 400 l.
transgressionem prædictam quoad depasturationem conculcationem
& consumptionem herbæ præd. cum averiis, Et quoad depressio-
nem subversion. & spoliation. al. herbæ & soli clausi præd. cum
carucis

Term. Trin. 32 Car. 2. 1680. B. R.

cārucis plaustris & al. cariagiis præd. necnon quoad effossion. in clauso præd. a præd. 8 die Augusti 30 Car. 2 usq. 23 diem Octobris 31 Car. 2. diversis diebus & vicibus continuando Et alia enormia, &c. ad damnum 500 l. The defendants demur, because the several continuances of the trespasses, are several trespasses by themselves, and ought not to be declared upon with a *Continuando*. Mich. 20. H. 7. 3. pl. 7. *Trespass quare domum suam fregit 1 Maii, continuando till 1 Junii.* Per Taxley it is good, *quia chescun entry est un fraction.* Mes Curia contra, Bro. *Trespass* 441. but for feeding the grass it is good, *ibid.* Mich. 2 R. 3. 15. pl. 41. *al mesne Pintent.* Pasch. 17 Car. 2. B. R. *Letchford versus Elliot.* Trespass for throwing logs into the plaintiff's close with a *continuando*, not good, but if *diversis diebus & vicibus* were in, it would be good, Mich. 25 Car. 2. B. R. *King versus Trespass quare clausum fregit pedibus ambulando & prosterne ses fences continuando* from such a day to such a day, after verdict seems not good, 2 Roll Abr. 549 pl. 5. 9 Car. 1. *Hofkins versus Jennings*, for cutting of trees. But it seems the words *diversis diebus & vicibus* do make the action good, as Pasch. 5 Jac. B. B. 2 Roll. Abr. 549. pl. 6. *King's case.* Trespass for spoiling corn in the blade, may be with a *continuando diversis diebus & temporibus* per two years, though there cannot be a continuance of such a trespass for so long together. Et adjournatur.

* P. 397.

* Jamaica, October 20. 1660.

In the year 1661. Sir Charles Littleton as deputy governor to the lord Windsor called the first assembly, which was held in Jamaica, and thereby made laws for raising a publick revenue by a tax on strong liquors towards the upholding of the government there, which laws are indefinite and perpetual. Afterwards, viz. 15 February 1663. The king grants power to Sir Thomas Modyford to choose his own counsel, and with the consent of the major part of them to frame general assemblies of freeholders, according to the usage of other plantations, and with their consent to make laws suitable to those of England, which should remain in force for the space of two years, and no longer, unless approved by his majesty. After Sir Thomas Modyford, Sir Thomas Linch succeeded, and after him the lord Vaughan, who had the like power with Sir Thomas Modyford: during the government of the lord Vaughan, the assembly granted the like

like revenue out of strong liquors, but to continue but two years.

The question hence arose, and which was referred by the privy council to the lord chief justice *North* to consider and certify his opinion, and to take the opinion of such other judges therein as he should think fit, whether the law made by the assembly in the lord *Vaughan's* time had totally laid aside the law made in *Sir Charles Littleton's* time by implication? And upon debate of the matter by the lord chief justice *North*, *Ellys*, myself and *Charleton* justices, and baron *Gregory*, it was resolved, that the last council having power to make laws to continue but two years, did not repeal the perpetual law made before, but did suspend its power during the two years, and no longer, according to the case of prices of wine, *Hob. 215.* where by 37 H. 8. cap. 23. a perpetual law was made for setting prices of wine; then by the statute of 5 E. 6. the said perpetual act (through the inadvertency of the parliament) was continued amongst other acts till the end of the parliament, which continuance was resolved to be idle as to that act; for an affirmative continuance of a perpetual statute cannot work an abrogation thereof; and when the two years expire, it is as if no such act had been made; for by 12 Co. 7. and 2 Inst. 684. when an act of repeal is repealed, the first act repealed is revived.

* John Norris *versus* Bayfield. Error C. B. London. * P. 398.

IN ejectment of a messuage, with the appurtenances in the parish of *saint Christopher*, of the demise of *Francis Norris* gentleman. Upon not guilty pleaded, verdict was given for the plaintiff, *quoad il. parcell. Messuagii prædict. jacen. proximam ad Messuagium modo infra nominat. Francisci Neve & contin. ex Boreali parte inde in fronte juxta Thredneedle-Street ab Occiden. ad Orien. octo pedes, & in profunditate Boream ad Austrum quindecim pedes, & contin. ex Australi parte inde in fronte juxta Cornhil ab Occiden. ad Orien. tres pedes & dimidium unius pedis, & in profunditate ab Austro ad Boream quadraginta pedes, Et quoad residuum* for the defendant, and judgment is given *quod Quer. recuperet terminum suum prædictum de & in prædict. parcell. prædict. Messuagii jacen. proximum ad prædict. Messuagium ut præfertur in occupatione prædict. Francisci Neve & continen. &c.*

Error general assigned, and the defendant pleads *In nullo est erratum.* But the chief error is, the variance between the

Term. Trin. 32 Car. 2. 1680, B. R.

the verdi& and the judgment. The verdi& is, *Jacen. proximum ad Messuagium modo Francisci Neve*. The judgment is, *Jacen. proximum ad Messuagium in occupatione prædicti. Francisci Neve*. Now if this variance be not amendable by the common law, it is not within any of the statutes of *Jeofails*, unless the words of 16 and 17 Car. 2. cap. 8. will help it, which are, *but that all such omissions, variances, defects, and all other matters of like nature, not being against the right of the matter of the suit, shall be amended, &c.* But I think, of and in the occupation are the same. *Et adjournatur*.

- * P. 399. * *Parsons versus Edward Cottrel*. Debt upon an Obligation of 100l. dat. 25 Febr. 31 Car. 2.

Intr. Trin. 31 Car. 2.

Debt.

THE defendant pleads, that before the exhibiting the bill, and after the date of the said obligation, viz. 17 March 31 Car. 2. By indenture between *John Ely* and the plaintiff of the one part, and one *William Cottrel*, and one *John Cottrel*, son of the said *William*, and the defendant, of the other part, *hic in Cur. prolat.* the plaintiff released to the defendant all claims and demands; *Et hoc, &c.*

The plaintiff demands oyer of the indenture, the words (as to this purpose) are, *the said John Ely and Thomas Parsons, for and in consideration of the sum of 50l. to them or one of them paid, or secured by bond lately entered into by the said Edward Cottrel, the receipt whereof they the said Thomas Parsons and John Ely do, and either of them doth release and acquit the said John Cottrel and Edward Cottrel, and either of them, and their and either of their heirs, &c. and for other good causes, &c. have granted and released to the said John Cottrel, his heirs and assigns, all that messuage, &c. Quibus lectis & auditis*, the plaintiff replies, that the bond in the declaration, and the bond mentioned in the indenture are the same; *Et hoc, &c.* The plaintiff demurs. And I am of opinion for the plaintiff. 1. The intent is clear that this security should not be discharged. 2. Claims and demands shall be intended for the money, and not concerning the bond. *Pasch. 3 Car. 1. Abree versus Page*. Debt upon an obligation, the defendant pleads a release of all errors, and all actions, suits and writs of error whatsoever. Adjudged, the release extended only to writs of error. But the case of

- * P. 399. *Rotheram and Crawley*, 3 Cro. 370. * and *Owen*. 71. pl. 142. seems otherwise; and therefore *Quære. Et adjournatur*.

Aglionby

Aglionby versus Isabella Towerfon Widow: Error in Carlisle.

THE plaintiff declares, That 11 November 29 Car. 2. Assumpsit. 1 Danv. Ab. 73. P. 15. there was a discourse between the plaintiff and defendant of and concerning a marriage to be had between one Christopher Richmond, esq; his sister's son, and one Isabel Reynoldson niece of the defendant. Upon which the said defendant then and there, in consideration that the plaintiff at the special instance and request of the defendant would endeavour and labour to persuade the said Christopher Richmond to marry the said Isabel Reynoldson, did promise that she would pay the plaintiff 40*l.* if the said marriage should take effect. The plaintiff *in fait* says, That he 31 Dec. 29 Car. 2. and divers other days and times at the instance and request of the defendant, *Omnibus modis quibus poterat conatus fuit & laboravit suadere præd. Christophorum* to marry the said Isabel Reynoldson, and that afterwards, viz. 1 July 30 Car. 2. the said marriage took effect, and yet the defendant hath not paid him the 40*l.* though ult. Sept. last past she was thereunto required.

The defendant pleaded *Non Assumpsit*, and verdict and judgment for the plaintiff, and 40*l.* damages; and the general error assigned; but the error insisted on was, That the plaintiff doth not shew how he did endeavour to persuade, and so uncertain, for he says only, *Omnibus modis quibus poterat*. But I conceive it is good enough; For 1. We shall not presume he did prevaricate, *Iniquum non est præsumendum*. 2. If he should set forth his speeches he made either in commendation of the young woman, or advantages of a married life, &c. the record would be too long, and perhaps we could not be competent judges of it, *Mich. 1651. in B. R. Barber versus Clerk, Assumpsit*, in consideration the plaintiff would renounce an executorship, the defendant would pay, &c. The plaintiff avers, *quod renunciavit*, and good; and yet the person before whom the renunciation was, might not be competent. *Mich. 1661. B. R. Baker versus Smith. Assumpsit*, The plaintiff being a virgin, had been prevailed with to make a contract with the defendant, and afterwards the defendant was desirous to be free; and thereupon the defendant * in consideration that the plaintiff would *disone-* * P. 401.
rare, Anglice would disengage, him of his promise, he promised to pay her 1000*l.* and she alledges, that she did disengage him; and adjudged good, without shewing how she

Term. Mich. 32 Car. 2. 1680. B. R.

did disengage him; and the whole court seemed to agree, that the declaration in principal is good; but they persuaded the plaintiff to go to a new trial, and he was prevailed with, because the damages were great for so small a matter.

Mason versus Jennings.

Case.

IN a special action upon the case. The plaintiff declares, that he is a hackney-coachman, and that the defendant with an intent to disgrace him did ride *Skimmington*, and describes how, thereby surmising that the plaintiff's wife had beat the plaintiff, and by reason thereof persons who formerly used him, refused to come into his coach and to be carried by him, *ad damnum*. Upon Not guilty pleaded, a verdict for the plaintiff; and upon motion in arrest of judgment, judgment was given *quod quer. nil capiat per billam*; and a judgment in the like case in C. B. was cited *Trin. 14. Car. 2. C. B. Ret. 1461.* in the case of *Lumley and Bad-denley*.

* P. 402. * Term. Mich. 32 Car. 2. 1680.
B. R.

Jane Zinzani and Frances Zinzani versus Talmage.
Error in C. B. Berks.

Copyhold.
2 Danv. Abr.
183. p. 3.
Pollexf. 561.
2 Jon. 142.
2 Show. 130.

IN ejectment of the demise of *Henry Zinzan, jun.* of three messuages, two hundred acres of land, forty acres of meadow, one hundred acres of pasture, and eight acres of wood in *Tylehurst*. The jury find a special verdict, That sir *Peter Vanlore, jun.* was seised in fee of the manor of *Tylehurst*, of which the lands in question are parcel, and held by copy of court-roll for one, two or three lives successively, one after the other, as they are named in the copy, according to the custom of the manor: Sir *Peter Vanlore*

Term. Mich. 32 Car. 2. 1680. B. R.

Vanlore had issue three daughters, viz. *Jacoba*, wife of *Henry Zinzan, sen. esq;* *Susanna*, wife of *sir Robert Croke, kn.* *Mary*, wife of *Henry Alexander* late earl of *Sterling* in *Scotland*. The said *sir Peter Vanlore, jun.* at a court held 8 March 1638. granted by copy the lands in question to *Henry Zinzan, sen. Habend.* to him and to the said *Henry Zinzan, jun.* lessor of the plaintiff, and *Peter Zinzan* sons of the said *Henry Zinzan, sen.* for their lives, successively, as they are named in the grant, at the will of the lord, according to the custom of the said manor. *Henry Zinzan, sen.* was admitted tenant, and entered and became seised for life, the remainder to *Henry Zinzan, jun.* and *Peter Zinzan* successively. *Sir Peter Vanlore* died without any issue male, and the said manor descended to his said three daughters. Within the said manor there is a custom, That if any customary lands are granted by one copy to two or more persons named in the same copy, for their lives, and the life of the longer liver of them successively, then the first person in such copy first named, may surrender all the lands, and thereby determine and destroy all the right, estate and title in the same tenements of all the other persons therein named.

* By indenture quadripartite, 10 May 28 Car. 2. between * P. 403.
the now earl of *Sterling*, son and heir of *Mary* late countess of *Sterling*, deceased, one of the daughters and co-heirs of the said *sir Peter Vanlore, jun.* deceased, and one of the grand-children and co-heirs of *sir Peter Vanlore, sen.* deceased, of the first part, the said *sir Robert Croke* and *Susanna* his wife, of the second part, the said *Henry Zinzan* alias *Alexander, sen.* first named in the said copy, and *Jacoba* his wife, of the third part, and *Daniel Blagrove* and *Joseph Baker*, of the fourth part, It was mutually agreed to levy a *Fine come ceo. &c.* to the said *Blagrove* and *Baker*, of the manor of *Tylehurst*, and of the lands in question by name, to the use of the said *Henry Zinzan, sen.* and *Jacoba* his wife for their lives without impeachment of waste, the remainder to the use of such person or persons, and for such estate and estates, limitations, uses, trusts, intents and purposes as the said *Jacoba Zinzan* in her life-time, married or unmarried, by any writing or writings by her sealed and subscribed in the presence of two or more credible witnesses, or by her last will and testament by her sealed and subscribed in the presence of two or more credible witnesses, should declare, nominate or appoint; and in default of such declaration, nomination or appointment, to the only use of the right heirs and assigns of the said *Jacoba* for ever. In *Trin.* term next a fine was levied accordingly. 20 Novem-

Term. Mich. 32 Car. 2. 1680. B. R.

ber 1676 the said *Henry Zinzan, sen.* died, and the said *Jacoba* him survived. 22 & 23 February 1676 the said *Jacoba* by her indentures of lease and release conveyed the premises to the said *Jane* and *Frances Zinzan* and their heirs, to the use of them and their heirs. 25 June 1677 *Jacoba* died, and the said *Jane* and *Frances* entered. *Henry Zinzan, jun.* being the second person in the said copy named, entered upon the possession of the said *Jane* and *Frances*, and demised to the plaintiff, upon whose possession the defendant re-entered. *Et sic, &c.* and judgment was given in *C. B.* for the plaintiff. And after argument in this court at the bar, judgment was affirmed by the whole court. The sole question was, Whether the conveyance of 10 May 28 Car. 2. and the fine pursuant thereto be a surrender within the custom to bar the estate of *Henry Zinzan*; and resolved it is not, because, 1. The custom extends only to the copyhold estate, and that cannot pass by the fine. 2. It being against common right shall be taken strictly. 'Tis against common right, because it gives power to tenant for life to destroy a third person's estate without any recompence. 'Tis taken strictly. * *Yelverton v. Basspole* versus *Long*: A custom, that if a surrenderee comes not in upon the third proclamation, he shall forfeit the estate: A surrender is made to the use of *A.* for life, the remainder to *B.* *A.* comes not in, *B.* shall not forfeit.

* P. 404.

Elizabeth Chichester versus Michael Philips.

Intr. Pasch. 32 Car. 2. Error out of Ireland.
Ejectionment.

Error.
3 Danv. Abr.
111. P. 3.
2 Jon. 146.

THE plaintiff *Philips* in the action, brought the action first in *C. B.* in *Ireland*, and declared of the demise of *Roger Masterfon, esq;* for eleven years. Upon Not guilty pleaded; and a trial at the bar in *C. B.* there was a bill of exceptions put in by the defendant, which was as follows:

Com. Wexford. ff. Memorandum qd. 11 Nov. 1678. existen. die præfix. per Justic. Domini Regis de *C. B.* hic in Craft. Animarum hoc Termino Sancti Michaelis 1678. supradict. ad triand. exit. inter Mich. Philips Gen. Quer. & Eliz. Chichester vid. Def. junct. de placito Transgr. & Ejection. firmæ Exit. præd. triat. fuit coram Roberto Johnson Arm. secundo Justic. Domini Regis de Banco prædict. & Adamo Gulsack Arm. un. al. Justic. dicti D'ni Regis de Banco

Term. Mich. 32 Car. 2. 1680. B. R.

Banco præd. ad Barram Cur. præd. præfat. Michael suppon. per breve & narration. sua quod quidam Rogerus Masterfon 11 die Januarii 29 Car. 2. *demised, &c. and recite the declaration and plea, and issue.* Et modo hic ad triation. exitus prædict. præfat. Michael dedit in evidenc. quod præfat. Rogerus feisit. fuit de præmiss. prædict. in dominico suo ut de feodo, & sic feisit. existen. dimisit tenementa præd. cum pertin. eidem Michaeli, Et quod ipse idem Michael virtute ejusdem dimission. in tenementa præd. intravit, & fuit inde possessionat. quousq; le Defendent luy ejet, prout il ad declare.

That the defendant gave in evidence to prove that she was Not guilty, That the said *Roger Masterfon* long before the said demise to the plaintiff, viz. 4 January 1672. by indenture for money bargained and sold the premisses to one *Edward Chichester* for 500 years, that the said *Edward Chichester* afterwards, viz. 14 February 1673, did make his last will in writing, and thereof made his brother *John Chichester* his executor, and *William Hancock* overseer. And to prove that he made the said will, she produced an instrument * under the seal of the prerogative court of *Canterbury*, reciting the said will, and that the said *John Chichester* was beyond the seas, and a grant of the administration to the said *William Hancock* for so long time as the said executor shall be beyond sea, dat. 3 Sept. 1674. And also one other writing in parchment under the seal of the consistory of the bishop of *Ferns*, purporting a probate of the said will by the executor himself, dat. 7 November 1678, that *Edward Chichester* named in the will, and in the probate, are the same persons. That the said *Edward* died in *England* 28 May 1673, and that the said *John Chichester* the executor is alive. That the plaintiff gave in evidence another writing in parchment, under the seal of the prerogative court of *Ireland*, dat. 15 December 1677, whereby reciting that the said *Edward Chichester* died intestate, the archbishop of *Armagh* granted administration to the plaintiff as principal creditor; whereupon the said *Elizabeth* without any farther proof of the said will, desired the said justices that they would direct the jury that the said writings produced by her were conclusive evidence to prove that the said *Edward Chichester* made the said will, and so she was Not guilty of the said trespass and ejectment.

Nevertheless the said justices did only direct the jury that the said writings were evidence, upon which they might find that the said *Edward* made the said will, but not that the same was conclusive evidence in that behalf, and so left it indifferently

Term. Mich. 132 Car. 2. 1680. B. R.

indifferently to the jury, Whether the said *Edward* made the said will or no, though the plaintiff offered nothing against the said will, but the said letters of administration granted by the said archbishop of *Armagh*; whereupon the jury found that the said *Edward* made no such will; thereupon judgment was given in *B. B.* for the plaintiff, and the defendant brought a writ of error in *B. R.* in *Ireland*, and there the judgment was affirmed; and now she hath brought a writ of error here, and assigns for error, the not allowing of the evidence to be conclusive, as in the bill of exceptions is alledged. And here also judgment was affirmed by the whole court, because though the evidence be conclusive, yet the jury may hazard an attain if they please; and the proper way for the defendant had been to have demurred upon the plaintiff's evidence. This question, whether the probate is conclusive, hath been variously allowed; but of later days it hath been adjudged, that nothing can be given in evidence against it, but forgery of it, or its being obtained by surprise.

* P. 406. * Authorities, that the evidence is not conclusive.

Trin. 44 E. 3. 16. a. pl. 1. Debt against an administrator. The defendant pleads, That the party made a will, and the defendant and another his executors, and judgment of the writ, and produces the will in court under the seal of the ordinary. The plaintiff replies that he died intestate, and the defendant rejoins, that the plaintiff ought not to be admitted to aver that against the seal of the ordinary; but *non allocatur*.

The defendant's suggestion, and issue was taken, Whether he died intestate, or no, notwithstanding the probate under seal. *Fitz. Eftoppel 9. Br. Eftoppel 36. 9 Co. 31. a. 41. a.*

Pasch. 22 H. 6. 52. b. pl. 25. By *Newton* and all his companions, the defendant may traverse, that the plaintiffs were not made executors notwithstanding the testament. *F. Executors 17 Bro Testament 4. Mich. 34 H. 6. 14. b. pl. 26.* By *Priest*, a testament may be disproved by the law of the church; as if *H.* makes two testaments and dies, the first testament is proved, and afterwards the second testament, which is the last will, is found, and another named executor, in this case this last testament now shall be proved, and the other shall be void. If the first executor bring an action as executor, the defendant may well avoid it by special matter. *Mich. 21 E. 4. 50. a. pl. 9.* by *Choke* and *Catesby*, where executors are plaintiffs, the defendant may say that the testator did not make them his executors, but such

such an one, and the issue shall be taken upon the matter in fact, and upon the probate of the testament, for they might forge a testament; so in administration the issue shall not be taken on the letters of the bishop, but on the matter *in fait*, viz. That the ordinary did not commit to them the administration by his letters. *Bro. Record* 28. A testament is not matter of record at the common law, notwithstanding the probate, for *H.* may deny the making of the parties executors, and try it *per patriam*. *Rast. Ent.* 325. Several pleas that the testator did not make the plaintiffs executors, and issue upon them. *Plow.* 282. *a.* The seal of the ordinary put to the administration is but matter *in fait*, which is not any *Estoppel* for the time, nor shall enforce the executor to sue in the spiritual court to repeal it; but he shall avoid this by plea, or by taking the goods of the administrator, or by any matter *in fait*, as occasion ministers. *Dyer* 294 *b.* *pl.* 7. Issue was joined, if the bishop of London hath committed administration, it shall be tried by the country. On the contrary, that the probate is not traversable; and so is the law at this day, *Roll. 1 Rep.* 226. *Trin.* 13 *Jac.* B. R. debt by an executor, he shews the will to the court proved by sentence. The testator pleads the defendant died intestate, and that the administration was committed to him, and shews an appeal of the said sentence of the probate of the will. And by *Coke*, *Dodderidge* and *Houghton*, it is not a good plea, because if it should, no executor should have an action during such appeal, which would be a grand prejudice.

P. 407.

Memorandum, 3 December 1680. At one o'clock in the morning died sir *William Ellys*, knt. one of the justices of the court of Common Pleas, at his chamber in *Serjeants-Inn* in *Fleet-street*, *Grandævus senectute*, viz. *ætat.* 71.

UPON the trial of the lord viscount *Stafford*, who was impeached by the house of commons of high treason, the case fell out to be, that his charge was, *That he hired persons to kill the king.* And upon the evidence it appeared, that *Stephen Dugdale* swore, that the prisoner proffered him 500*l.* to do it; and *Oates* another witness swore, that the prisoner received a commission to be pay-master to an army to be raised by the *Roman Catholics*; and *Turberville* swore, that another five or six years before time, the prisoner at *Paris* proffered him a good reward to kill the king. And upon this evidence, the question was put to all the judges then attending (who were all there, but *Scroger* chief

Term. Mich. 32 Car. 2. 1680. B. R.

chief justice, and *Ellys*, who was lately dead) Whether this was sufficient evidence for convicting the offender by the statute of 1 E. 6. cap. 12. and 5 E. 6. cap. 11. which requires two witnesses for convicting of a traitor, and for finding an indictment; and here is but one witness to each fact. And after conference between themselves, all the judges delivered their opinions *seriatim*, beginning with the lord chief justice *North*; that when the prisoner is charged with the offence of killing the king, and the evidence is, That he at several times laboured it, and by several ways, and to each particular time and fact there is but one witness, and yet every of the said facts conduces directly to the effecting and perpetration of the fact and treason charged upon the prisoner, such evidence is sufficient within the statute. But otherwise it had been if the facts had been tending to another several treason; and the reason given why such evidence was good, was because otherwise it would be * P. 408, a most difficult thing, and almost * impossible to convict any one of high treason for compassing the death of the king, for such compassings are seldom acted in the presence of two witnesses at one time present. And upon this occasion my lord chancellor in the lords house was pleased to communicate a notion concerning the reason of two witnesses in treason, which he said was not very familiar he believed; and it was this, anciently all or most of the judges were churchmen and ecclesiastical persons, and by the canon law now, and then in use all over the christian world, none can be condemned of heresy but by two lawful and credible witnesses; and bare words may make a heretick, but not a traitor, and antiently heresy was treason; and from thence the parliament thought fit to appoint, that two witnesses ought to be for proof of high treason.

In the same trial of the said viscount, after the lords had *seriatim* voted (whereof thirty two acquitted, and fifty four condemned him) he moved in arrest of judgment, that every person arraigned ought by the law to hold up his hand at the bar, which he did not, nor ever was demanded so to do; and thereupon the opinion of all the judges was asked, who unanimously answered, That that ceremony was only for the making known the person of the offender to the court, and if he answers that he is the same person, 'tis all one; and so it falls out sometimes in the circuits, that some will not hold up their hand, and yet have been condemned; and judgment of high treason was given against the prisoner on

Tuesday

Tuesday
Fined

E
wife
find

T
the l
son,
his w

*
for ex
Sc.

Robe
26
tor d
son a

R
codic
An

unto
more
ment,
codic

T
of m
ment
the f

T
vised
16

last
testan
son b
Berr

1
the g
mille
W

father
Mary

Term. Mich. 32 Car. 2. 1680. B. R.

Tuesday the 7th of December 1680. by the lord chancellor Finch, who was high steward *pro tempore*.

John Stead *versus* Elizabeth Berrier, Widow.

Error out of C. B.

EJECTMENT of the demise of *Thomas Stead* and *Judith* his wife, and *Richard Stockdale* and *Mary* his wife for five years. Upon Not guilty pleaded, the jury find a special verdict,

That *Robert Berrier* of *Kingslon* upon *Hull* was seised of the lands in question in fee, and had issue *William* his eldest son, and *Robert* his younger, and 29 October 1669. made his will in writing, and thereby devised in these words.

* I devise and give to my son *Robert Berrier* and his heirs for ever, all that my farm, &c. being the lands in question, &c. *inter alia*. Item, I give and bequeath unto my grandchild *Robert Berrier* 100l.

26 December 1669. *Robert Berrier* the son of the testator died (the testator living) leaving issue *Robert Berrier* his son and heir.

Robert Berrier the grandfather 26 March 1671. made a codicil to be annexed to his said will in these words,

And also I the aforesaid *Robert Berrier* do give and bequeath unto my grandchild *Judith Berrier*, and her heirs for ever, more than I have formerly given by this my last will and testament, a little close, &c. This I will shall be added as a codicil, and taken as part of my last will and testament.

The tenements by the said codicil devised are ten acres of meadow, and ten acres in *Fishing*, part of the tenements devised by the said *Robert* the grandfather to *Robert* the father.

The tenements in the declaration are the tenements devised by the will to *Robert* the father.

16 May 1671. *Robert* the grandfather did republish his last will, and by parol, and without any writing, *Animo testandi* did declare, That the said *Robert Berrier* the grandson by the same will should take and have as the said *Robert Berrier* his father might take and have.

1 March 1672. *Robert* the grandfather died, and *Robert* the grandson him survived, and entered into the said premises, and became seised *prout lex postulat*.

William Berrier eldest son of the said *Robert* the grandfather, 25 September 1646 died, leaving issue *Judith* and *Mary* the lessors of the plaintiff, whose husbands in their right

Devise.
2 Danv. Abr.
534. p. 10.
1 Vent. 341.
2 Lev. 243.
2 Jones 135.
Pollexf 546.
1 Mod 267.
2 Mod. 313.
3 Keb. 845.
2 Show. 63.
* P. 409.

right entered on the possession of the said *Robert* the grandson, and made the lease to the plaintiff. *Et si, &c.*

Judgment was given in *C. B.* for the defendant, and the plaintiff brings his writ of error, and assigns the general error. And by *Scrags* chief justice, *Jones* and myself, judgment was reversed, but *Dolben* justice *contra*. We had all prepared to deliver our opinions openly in court, but in regard my lord chief justice had business of his own in the lords house, he desired that he might deliver the sense of the court without any argument; I was prepared with this to say for my opinion, *viz.*

* P. 410. * 1. I do not find at the bar any objection to the want of finding a good title for the plaintiff in this verdict, as was objected in *C. B. viz.* That it is not found that *Judith* and *Mary* wives of the lessors of the plaintiff are grand daughters and heirs to the testator; neither do I find any ground for the objection; for it is found that *Robert Berrier* the testator had issue *William, primogenitum filium suum*, and also *Robert* father of the defendant his younger, and that *William* died in the lifetime of the testator, leaving issue the said women, whereby in a special verdict it must be necessarily intended, that they are heirs at law to the testator.

In this case there have been two points in question, both tending to the making good a title to the defendant.

1. Whether the new publication of 16 May 1671. whereby the testator did declare that *Robert Berrier* the grandson by the same will should take and have, as the said *Robert Berrier* his father might take and have, did pass any estate to *Robert* the grandson?

2. If that point fail for the defendant, then, Whether by the words of the will, *I devise and give to my son Robert Berrier and his heirs for ever, Robert* the grandson can take?

I hold in both points for the plaintiff in the action, and that the judgment (with all due reverence and respect to the persons and court that gave it) ought to be reversed.

As to the first point, I cannot distinguish it from the third point in *Bret and Rigden's* case, *Plowden* 345. b. The words there were, *That Thomas Bret the son should be heir to Giles (the deviser) and that he should have all the lands which his father by the will should have, if he had lived;* and here the words are, *That Robert Berrier the grandson shall take and have as his father might take and have.* It not being

being in writing cannot pass any thing, by reason of the statutes which appoint land to pass by will in writing. And so were *Gawdy* and *Clench*'s opinions in *Fuller* and *Fuller*'s case, 3 Cro. 423. But this point seems to be agreed with me at the bar, and therefore I shall not insist upon it farther.

As to the second point. Constructions of wills ought to be collected out of the words, and not *dehors*, or by averment, as 5 Co. 68. *Chenye*'s case; and therefore 39 Eliz. *Challoner* versus *Bowyer*, 2 Leon. 70. pl. 94. William Bowyer had two sons, and devised his land to his younger son in tail, * the remainder to the heirs of the body of his eldest son, * P. 411. the remainder to his daughters in tail; William Bowyer dies, the younger son dies without issue, leaving the eldest son; and in an assise, the tenant produced witnesses to swear that the deviser declared, That as long as his eldest son had issue of his body, the daughters should not have the land; but the court utterly rejected the evidence; and indeed were it otherwise, no man could advise his client, or know the certainty of any will; for if contrary to, or otherwise than what appears written might be averred, one will would appear in writing, and quite another upon evidence.

Which being so, it necessarily follows, that the parol declaration is out of doors in this will, and it is not at all to be taken notice of.

Then the words on which the defendant must rely for his title, are,

I give to my son Robert and his heirs, by which the defendant must take either as heir to his father, or as son to his grandfather.

The first he cannot, by *Bret* and *Rigden*'s case, in the second point there, because the words (*heirs*) is but to shew the quantity of the estate given, and to make them persons to take immediately by the will.

He cannot take as son, for these reasons.

1. The word *son* is never taken for *grandson*, no more than *child* is taken for *grandchild*. 3 Cro. 357. *Brown* versus *Pease*. *Warner* seised in fee of two manors, *Warners* and *Churchall*, devises *Warners* to the eldest son of his cousin *Richard Foster* in fee, and he devises the manor of *Churchall* to *Margaret Waters* for life, the remainder to such of his cousin *Foster*'s children as shall be then alive and owner of *Warners*. Resolved, If such son be dead, when *Waters* dies, the grandchild of *Richard Foster* shall not take; the reason is given, because out of the words *child* and *grandchild* are different persons.

2. The

Term. Mich. 32 Car. 2. 1680. B. R.

2. The words (*son*) and (*grandson*) are discriminating words in all instruments, and in this very will, for he gives the land to his son, and 100*l*. legacy to his grandson.

3. By the same reason, the son of the grandson may take; and it appears not whether this *Robert* had a son named *Robert*.

4. It was not the intent of the devisor (as expressed in the will) *That the grandson should take*, for he makes him a distinct legatee.

* P. 412. * 5. The inconvenience which would ensue, should the word (*son*) be so taken; no certain construction could be made, for so *godson*, *great grandson*, *son-in-law*, &c. may take, and no body can guess whom the testator meant. The same mischief would happen, as by an averment before-mentioned.

Had the defendant been called frequently by the testator in his life-time, his son, he had been capable to take by that name; as an illegitimate son may take by the name of the reputed father, after he hath acquired a certain name by reputation.

But it is not found in the whole record, that the testator knew of the death of his son *Robert*. True it is, that the parol declaration disposes to the defendant what was given to his father, but that may be as well for other reasons as for death.

Object. The new publication is as if the will were new writ over again.

Resp. I grant it. But then if the words are the same, there will no more pass than by the first writing.

If he had devised to *Robert Berrier* (without addition) or to my heir *Robert* (if the truth were, that his heir at his death proved to be *Robert*) this new publication would have made the will have passed the lands, because the words would have agreed with the person of the devisee, as in *Beckford* and *Parncot's* case. 3 Cro. 493. *Parsons* seised of lands in *Aldworth* devised all his lands there to his daughters *Barbara* and *Joan*, and then purchases more, and then new publishes his will. Resolved, The new purchased lands passed, because sufficient words; so is *Bret* and *Rigden's* case in the second point there.

Object. By the record it appears, that the devisor intended to pass the land to his grandson the defendant.

Resp. The intent appears not by the will. 2. That intent was not according to law, and the intent must be subservient to the rules of law, and not *e contra*, as *Counden* and *Clark's* case is, and many cases might be cited on that head.

Term. Mich. 32 Car. 2. 1680. B. R.

head. And 3dly, wills must have an apparent intent, when they disinherit an heir. 1 Cro. 369. *Sprit versus Bence*.

As to the lease made by two copartners and their husbands, *Vide Moor* 682. pl. 939. *Millener versus Robinson*, Noy 13. 2 Cro. 83. *Jurdain versus Steer* 166. *Mantle versus Wallington*. It seems good enough after a verdict; and judgment was reversed.

* *Harrison versus Belkey. Kanc. Ejectment.* * P. 413.

JOHNN PEPPER seised in fee, by lease and release for 100 l. conveys the lands in question, to the use of Paul Barret Sen. and Sarah Barret his daughter, for their lives, the remainder to the use of the first, and every other sons of Sarah in tail male, the remainder to the use of her daughters equally to be divided in tail male, the remainder to the use of the right heirs of Paul. Sarah by deed gives, grants, remises and releases all her right and estate to the said Paul and his heirs, to the use of him and his heirs. Sarah marries Samuel Hall, and hath issue Samuel Hall lessor of the plaintiff. Paul Barret by indenture 22 May 28 Car. 2. covenants to stand seised to the use of himself for life, the remainder to Sarah Norwood his grandchild for her life, the remainder to Paul and Thomas Norwood his grandchildren, and their heirs. Paul dies.

Remainder.
1 Vent. 345.
2 Jon. 136.
2 Show. 91.
Pollexf. 573.

The sole question of this case is, whether the remainder limited to Samuel Hall lessor of the plaintiff, as first son of Sarah, be destroyed by Sarah's release?

And I conceive it is not, and that judgment ought to be given for the plaintiff.

1. It cannot be denied by the other side, but that Paul Barret and Sarah were joint-tenants for their lives, and that the estate in fee-simple is not executed in Paul Barret. *Coke upon Littleton* 182. a.

For though a discent or any other subsequent conveyance will destroy the jointure, as *Westcot's case* is, 2 Co. 60. yet till then they remain joint-tenants.

Coke upon Littleton 273. Two coparceners of a rent, and one marries the ter-tenant, the other may release to her that was married.

'Tis requisite for the execution of all contingent remainders, that the particular estate do continue the same it was at the time of the creation thereof, when the use comes in esse; for it must vest either during the particular estate, or at least *eo instante* that the particular estate determines. 1. Co. 66. *Archer's case*.

3. This

Term. Mich. 32 Car. 2. 1680. B. R.

3. This release doth not alter the estate. 1 *Coke upon Littleton* 273. Such a release is no alienation, *Winch* 63. *Wafe* versus *Pretty*. By *Winch*. justice, and *Hobart*, if land be given to two upon condition, that they shall not alien, and * one releases to the other, it is no breach of the condition. 2. It makes no degree, for the releesee is in by the lessor. *Coke upon Littleton* 184.

• P. 414.

And though the remainder did before depend upon an estate for two lives, and now but on one, that one is the same estate in quality, though not in quantity.

Fitz. Aid, 77. Tenants in special tail recover in assize, and afterwards one dies without issue, and the other being tenant in tail after possibility, is redisseised, he shall have a redisseisin, because it is the same freehold which he had before, and is part of the estate-tail.

I conceive the case of a condition of accruer is a stronger case; there the estate on which the condition is to grow must continue the same. And yet 8 *Co.* 75. b. If a man grant land to another and his heirs on the body of his wife, with such a condition, and the wife dies without issue, yet he may perform the condition.

4. The intent of the parties (which is observable in all acts, and especially in the disposition of estates) was only to transfer *Sarah's* estate to *Paul*, and not to deprive her children, she being but tenant for life.

Her acts shall be construed with as much strictness as the rules of law will permit. Judgment was given for the plaintiff by *Scrogs* chief justice, *Jones* and myself: but my brother *Dolben* was for the defendant, but had not opportunity to shew his reasons, because my lord chief justice desired that he might deliver all our opinions shortly.

Osborn versus Wandel.

Trespass.

TRESPASS upon the statute of 1 R. 3 cap. 3. for taking the plaintiff's goods (being arrested for suspicion of felony) before conviction, and declares of seizing a certain parcel of money; and after verdict for the plaintiff, *Stanhope* moved in arrest of judgment, because the words of the statute are, *that none shall seize the (goods) of any person, &c.* and money is not goods, *Fitz. Brief* 512. But adjudged for the plaintiff, and that money is goods; and that case is only the opinion of *Finchden*.

Valentine

Term. Mich. 32 Car. 2. 1680. B. R.

* Valentine Joyner *versus* Sir Robert Vyner. *Error.* * P. 415.
in C. B. London.

Intr. Pasch. 32 Car. 2.

DEBT upon a bond against the defendant as son and Award.
heir of *Christopher Joyner*. The defendant demands
oyer of the condition, which is, *whereas the above-bound*
Christopher Joyner did 4 December 1665, leave with Henry
Lewys, then servant to the above-named Sir Robert Vyner, a
bill of exchange of the sum of 61 l. 14 s. 4 d. payable by Richard
Fuller late of London merchant, deceased, and upon leaving the
said bill the said Christopher Joyner had credit in his account
with the said Sir Robert Vyner for the said sum of 61 l. 14 s.
4 d. And whereas the said *Henry Lewys* doth aver that the
said sum of 61 l. 14 s. 4 d. was not paid to the said Sir Robert Vy-
ner, or any other person for his use, the condition therefore of this
obligation is such, that if the said Christopher Joyner shall not,
before the 10th of November next the date above-written, legally
and sufficiently prove, that the said sum of 61 l. 14 s. 4 d. was paid
to the said Sir Robert Vyner, or to his use, then if the said
Christopher Joyner, his heirs, executors, administrators or
assigns do well and truly pay or cause to be paid to the said Sir
Robert Vyner, his executors or assigns upon the said 10th of
November the said sum of 61 l. 14 s. 4 d. and all interest at 6 l.
per 100 l. per annum accruing for the said money, from the
said 4th day of December 1665. until the payment thereof, that
then this obligation to be void. Quibus lectis & auditis, the
defendant pleads, that the said *Christopher Joyner* his father,
after the making of the said bond, and before the said 10th
of November viz. 20 May 24 Car. 2. died. The plaintiff
demurs; and adjudged by the whole court for the plaintiff;
for there is a difference where the condition contains a duty
vested in the obligee, and where it is only a collateral act;
for in the first case the executors are bound to perform it;
and so the obligor forfeits his obligation if it be not performed.
3 Cro. 10. *Kingwell versus Knapman*, 2 Leon. 155. Debt
upon an obligation, conditioned, that whereas there were
divers controversies between the plaintiff and the brother of
the defendant, and they submitted themselves to the * arbi- * P. 416.
trament of one *Coxin*. Now if the said brother perform the
award, then, &c. The defendant pleads that the arbitrator
made an award that the brother should pay 30 l. viz. 20 l. at
Easter, and 10 l. at Michaelmas, and that he paid the 20 l.
but

Term. Mich. 32 Car. 2. 1680. B. R.

but before *Michaelmas* he died; and adjudged for the plaintiff, because the sum awarded was become a duty; but otherwise where no duty, as to make a feoffment, or to prove an allegation in a bill of equity. *Dyer* 262. a. pl. 30. *Arundel versus Comb.*

Dorothy Lee, Administratrix of William Lee her Husband, against Charles Garret and Mary his Wife, Executrix of Frances Ambler. *Midd.*

Debt.
2 Show. 143.

DE B T upon an obligation of 600 l. dat. 11 Aug. 1657. the condition whereof (upon oyer demanded) is, that whereas a marriage hath been lately had between the above-named William Lee and Mary daughter of the above-bound Frances Ambler; if now the heirs, executors, administrators or assigns of the said Francis Ambler do and shall well and truly pay or cause to be paid unto the said William Lee, his executors, administrators or assigns the full and whole sum of 300 l. within two months next after the death of the said Frances Ambler, if the said Mary, or any issue of her body by William shall be living at the death of the said Frances. Then, &c. The defendant pleads, that 1 January 29 Car. 2. the said William Lee died intestate, and the said Francis Ambler him survived; and 15 Febr. 31 Car. 2. died, and that the said Mary the wife of William Lee died before the said Frances, leaving the said Mary wife of the defendant.

That at the death of the said Frances, nor any time within two months next after the death of the said Frances, there was no executor or administrator of the said William Lee, nor any person appointed on the behalf of the said William Lee, to have or to receive the said 300 l. in the said condition mentioned, nor to whom the same could be paid according to the form of the said condition; and that administration of his goods and chattels was not granted within one year next after the death of the said Frances. The plaintiff demurs generally; and adjudged for the plaintiff, because the money being a duty, the defendant ought to have pleaded, *incore prius*, &c.

* P. 417. *Attorney General versus Blood, Christian & al. *Midd.*

Conspiracy.
2 Show. 114.

AN information for conspiring to indict the duke of Buckingham of buggery of a boy called *Nemar*. Upon

Term. Mich. 32 Car. 2. 1680. B. R.

not guilty pleaded, they were tried at the bar in Trinity-term last, and found guilty. And Saunders moved in arrest of judgment.

1. That the writ of *Venire facias* was *probos & legales homines*, whereas it ought to have been *liberos & legales homines*, for there is a difference between *probus*, *liber* & *legalis*, for *legalis* is he who is not outlawed, and against whom no exception can be taken in this behalf. *Probus* is not taken notice of in law. *Liber homo* is not only one that hath freehold land, but that hath freedom of mind, and stands indifferent, no more inclining to the one than the other, Coke upon Littleton 155 b. but *probus* extends not so far.

2. The writ is *quorum quilibet* may expend 20 l. in lands; and yet the statute of 16 & 17 Car. 2. cap. 3. is expired; and the defendant may be kept in durance and imprisonment for default of jurors of that value; and the statutes of 35 H. 8. cap. 6. and 27 Eliz. cap. 6. prescribe a certain form for the writ; and though those statutes of themselves extend not to pleas of the crown, yet the statute of 4 & 5 Ph. & Mar. cap. 7. directs the statute of 35 H. 8. to extend to such cases; and the form being prescribed, ought not to be varied from, 1 Roll. Abr. 803. n. pl. 4. Ludlow versus Edgeworth. Scire for Sciri, resolved not good; and pl. 5. *quorum quilibet* had 4 l. in an inferior court; judgment was reversed for that cause. And here no statute of *Jeofails* helps, because an information for the king.

Pollexfen for the attorney general. 1. *Probos & liberos* are of one sense; and the statute doth not tie the writ to the very words; and there are multitudes of precedents, which are thus.

2. 'Tis for the advantage of the defendant to have a substantial jury, 2 Cro. 672. *Philpot* versus *Feeler*, 3 Cro. 257. *Morris* versus *Thomas*. And before the statutes it was, and now is in the power of the court to award a *Ven. fac.* of what larger sum they please.

* And the chief justice, and the other two justices were P. 418. clear, that the writ was good for the reasons alledged by *Pollexfen*; and so was I as to the first exception; but I was not, nor yet am satisfied as to the second exception; for if it shall be in the power of the court to put what sum they please in the *Venire fac.* the defendant being in prison may be there detained for want of jurors of that value; but judgment was given against the defendant *Christian*, (for *Blood* was dead) and one more, viz. *That Christian should stand in the pillory an hour at Charing-Cross, between ten and twelve,*
C c and

Term. Mich. 32 Car. 2. 1680. B. R.

and pay one hundred marks, and lie in prison till he paid it. The other was fined twenty marks, and awarded to the pillory.

Gray versus Day.

Case.
1 Danv. Ab.
211. p. 18.
2 Jon. 132.
2 Show. 144.

AN action upon the case. The plaintiff declares, that he being church-warden of such a parish, and having given an account at the end of his year to his successor, and the parishioners; the defendant falsely and maliciously cited him into the ecclesiastical court to render an account, and there at the defendant's request the judge excommunicated the plaintiff for not rendering an account. Upon not guilty pleaded, and verdict for the plaintiff, *Saunders* moved in arrest of judgment, because the sentence was given by the judge, and so he and the court were to blame, and not the defendant. But resolved the action lies; and judgment was given for the plaintiff; and in this case for the plaintiff were cited 1 Cro. 291. *Carlion* versus *Mill*, 2 Cro. 667. *Steer* versus *Scoble*, 355. *Weald* versus *Pease*, 3 Cro. 574. *Willis* versus *Stroud*. *Jones* 312. 1 Roll. Abr. 34. c. pl. 4. 112. p. pl.

Anne Crouche versus Fastolfe. London.

Rent.

* P. 419.

DEBT for rent upon a lease for years, by indenture, of a messuage in *Redrith* in *Surrey*. The defendant pleads, that upon *Christmas-day* (being the quarter-day for which the rent is demanded in the declaration) he was at the said messuage by the space of an hour before sun-rising until sun-setting, of the same day, ready to pay the said rent, and that neither the plaintiff nor any other on her behalf came or was ready there to receive it; and that he always since the said day hath been, and yet is ready to pay the same, *Et denar. ill. idem Johannes hic in Cur. profert parat. fore solvend. præfat. Annæ, si eadem Anna illos de eodem Johanne recipere velit. Et hoc, &c.* And upon this the plaintiff demurs, because the defendant hath not alledged a tender on the day, but only that he was there ready to pay the rent. But resolved it is well enough; and adjudged for the defendant. 14 E. 4. 4. 22 H. 6. 57. 21 E. 4. 6. 7 Co. *Maund's* case. *Hob.* 207. *Crawley* versus *Kingswell*. *Winch Intr.* 1032. 1 Cro. 76. 3 Cro. 828. 1 Leon. 71. pl. 95. *Bret* versus *Audar*. And tender needs not; but otherwise where there is a condition, the breach whereof is to be saved.

Memorandum,

Term. Hill. 32 & 33 Car. 2. B. R.

Memorandum, 29 December 1680. Sir John Kelyng knight, of counsel extraordinary to the king, and his serjeant, died at his house in Southill in Bedfordshire.

* Term. Hill. 32 & 33 Car. 2. B. R. * P. 420.

Leeson versus Dover. London.

Trin. 32 Car. 2.

DEBT upon a bond of 600*l.* dat. 19 Junii 27 Car. 2. Condition.
The defendant demands oyer of the condition, which is, whereas there hath been a marriage lately solemnized between the above-named John Leeson and Anne Dover, daughter of the above-bound John Dover, and that the said John Dover did promise to pay the sum of 500*l.* as the marriage portion of the said Anne to the said John Leeson, 200*l.* of which said sum hath been paid accordingly by the above-bound John Dover. Now if the above-bound John Dover shall and do well and truly pay or cause to be paid the due interest of 300*l.* yearly, and every year, being 18*l.* unto the above-named John Leeson at two times or feasts in the year by equal portions, that is to say, 9*l.* upon the feast of St. Thomas the apostle next ensuing, and the other 9*l.* upon the feast of St. John the Baptist, which shall be in the year of our Lord .676. And it is farther the condition of this obligation, that the above-bound John Dover shall retain the principal money, being 300*l.* as aforesaid, in his hand, for the use of the said Anne, until such time as the said John Leeson shall settle, or cause to be settled, upon the said Anne, a jointure equal in value to the said sum of 300*l.* and then, that the above-bound John Dover shall upon half a year's notice thereof pay the said sum to the said John Leeson, to be to his own proper use for ever; all which the above-bound John Dover shall well and truly perform and keep; then this obligation to be void. Quibus lectis & auditis, the defendant pleads, *Actio non*, for that he paid the said John Leeson 9*l.* on St. Thomas's day next following the date of the said obligation,

Term. Hill. 32 & 33 Car. 2. B. R.

gation, and the other 9*l.* on St *John Baptist's* day 1676. according to the form of the condition. That he retained the said sum of 300*l.* for the use of the said *Anne Leeson* till
 * P. 421. the * plaintiff should settle a jointure, which he hath not yet done. The plaintiff demurs, because the defendant doth not plead payment of interest for the said 300*l.* after the first year; and it was adjudged for the plaintiff by the whole court, (except *Scrogs* chief justice who was absent) for that upon the whole condition it appears, that the intent of both parties was, that interest should be paid for the 300*l.* for these reasons,

1. By the preamble of the condition it appears, that 500*l.* was to be the marriage portion of *Anne*, and that the plaintiff was to have it without respect to the making of a jointure.

2. The words are, that the defendant shall pay due interest for the 3000*l.* yearly, and every year, which must necessarily extend beyond one year.

3. The principal was to be retained till settlement, which implies that he was to pay interest: for principal and interest are relatives.

Lambert & Olliot *versus* Bessey. Error. C. B.
 Pasch. 31 Car. 2. Rot. 382. Norff.

Imprisonment.
 2 Jon. 214.
 Skin. 49.
 Postea 467.

TRESPASS and false imprisonment. The plaintiff declares, that the defendants *Lambert* and *Olliot* simul cum *Bowles* *Ringall*, *Barloe* and *Woodcroft*, 1 April 29 Car. 2. vi & armis did take and imprison the plaintiff *Bessey*, and him did evil intreat at *Worstead*, and so in prison did him from thence to *Aylesham* lead, and there for the space of three weeks did detain, till he paid them 7*s.* 4*d.* Et alia enormia, &c. ad damnum 100*l.* The defendant *Lambert* pleads not guilty, and after issue joined, the plaintiff enters a *Nolle Prosequi* as to *Lambert*. The defendant *Olliot*, as to all but the imprisonment pleads not guilty; and as to the imprisonment at *Aylesham* for three weeks, he says, that 12 Febr. in *Hillary-Term* 28 & 22 Car. 2. there issued out a writ of *Non omittas* out of the court of C. B. against one *Stephen Green*, and against the plaintiff, and one *Thomas Palmer*, at the suit of Sir *John Hobart* baronet, directed to the sheriff of *Norfolk*, by which said writ the king commanded the said sheriff that he should take the said parties, and have their bodies at *Westminster* before the justices of C. B. Mense

C. B. *Mense Pasch.* then next following, to answer the said
 * Sir John Hobart in a plea of trespass *quare clausum fregit*,
 and a debt of 200 l. which said writ the said Sir John Hobart,
 21 March 29 Car. 2. delivered to the then sheriff of Norfolk
 to be executed, by virtue whereof, and to the intent the said
 writ might be executed, the said sheriff made a warrant to
 the bailiff of the liberty of the duke of Norfolk in the said
 county, who then had, and yet hath execution of all writs
 within the said liberty, and return thereof, *Infra quam exe-*
cutio istius brevis totaliter restabat faciend. pro eo quod nulla alia
executio inde alibi extra libertat. præd. infra ballivam suam fieri
potuit, which said warrant the said Sir John Hobart delivered
 to Arthur Onslow, esq; then bailiff of the said liberty 28
 March 29 Car. 2. to be executed; by virtue whereof the
 said Arthur Onslow made a warrant the same day to the said
 William Woodcroft and Samuel Bowles his deputy bailiffs, to
 take the said Bessy, &c. by virtue whereof the said Wood-
 croft and Bowles, 1 April 29 Car. 2. took the said Bessy
 and carried him to Aylesham, and delivered him over to the
 said Simon Olliot then keeper of the prison of the bailiff of
 the liberty aforesaid, at Aylesham aforesaid; by virtue
 whereof the said defendant took him the said Bessy and de-
 tained him by the space aforesaid, *prout ei bene licuit, quæ*
fuit eadem imprisonamenta, &c. Et hoc, &c. unde, &c. The
 plaintiff replies, that the defendant Olliot imprisoned him *de*
injuria sua propria, absque hoc, that the said Woodcroft and
 Bowles did take the plaintiff within the said liberty of the
 said duke of Norfolk. The defendant demurs, and shews
 for cause, that the plaintiff traverses a matter not traversa-
 ble; and judgment was given in the Common Pleas for the
 plaintiff, and damages 100 l. and the defendant brought a
 writ of error; and I conceive judgment ought to be at-
 firmed.

1. In all civil acts the law doth not so much regard the
 intent of the actor, as the loss and damage of the party suf-
 fering; and therefore Mich. 6. E. 4. 7. a. pl. 18. *Trespass*
quare vi & armis clausum fregit, & herbam suam pedibus con-
cucando consumpsit in six acres. The defendant pleads, that
 he hath an acre lying next the said six acres, and upon it a
 hedge of thorns, and he cut the thorns, and they *ipso invito*
 fell upon the plaintiff's land, and the defendant took them
 off as soon as he could, which is the same trespass; and the
 plaintiff demurred; and adjudged for the plaintiff; for
 though a man doth a lawful thing, yet if any damage do
 hereby befall another, he shall answer it, if he could have
 avoided

* P. 423. avoided it. As if * a man lop a tree, and the boughs fall upon another *ipso invito*, yet an action lies. If a man shoot at butts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the fallows growing upon the river side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber falls on my neighbour's house and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there, *Actus non facit reum nisi mens sit rea*.

Mich. 23 Car. 1. B. R. Stile 72. Guilbert versus Stone. Trespass for entering his close, and taking away his horse. The defendant pleads, that he for fear of his life by threats of twelve men, went into the plaintiff's house and took the horse. The plaintiff demurred; and adjudged for the plaintiff, because threats could not excuse the defendant, and make satisfaction to the plaintiff.

Hob. 134. Weaver versus Ward. Trespass of assault and battery. The defendant pleads, that he was a trained soldier in London, and he and the plaintiff were skirmishing with their company, and the defendant with his musket *casualiter, & per infortunium & contra voluntatem suam* in discharging of his gun hurt the plaintiff; and resolved no good plea. So here, though the defendant knew not of the wrongful taking of the plaintiff, yet that will not make any recompense for the wrong the plaintiff hath sustained.

2. The defendant here suffers no wrong but by his own act and will, for he was not compellable to be gaoler. And when a man takes an office, it is presumed he knows of all the conveniencies and inconveniencies which attend it. And in this, as in all other contracts, he must take the bad with the good.

3. As the gaols of the counties are incident to the office of the sheriff, 4 Co. 34. a. so the gaols of liberties are incident to the lord of the liberty. And the gaoler is but servant to him, as the gaoler of the county gaol is to the sheriff, and consequently they understand one another, and are privy to each other's acts relating to the prisoners, in presumption of law.

Object.

Term. Hill. 32 & 33 Car. 2. B. B.

* *Object.* By this way a subsequent sheriff may be answerable for the tort of his predecessor. P. 424.

Resp. So he must, as it hath been resolved, for the reason before alledged.

2 Cro. 379. *Wythers versus Henly.* Trespass and false imprisonment, and detaining him for a month. The defendant justifies by virtue of a *Process* out of the exchequer, directed to the defendant's predecessor, who took him by it, and also by virtue of a *Latitat*; and so the plaintiff was delivered over to the defendant. The plaintiff replies as to the exchequer *Process*, there was a *Superfedeas*, and that the predecessor detained him after the *Superfedeas* delivered; and as to the *Latitat*, that the plaintiff in that action ordered the defendant's predecessor to discharge the now plaintiff. And upon this plea the defendant demurred; and adjudged for the plaintiff, because this detaining by the now defendant is *quasi* a new taking. And the subsequent sheriff is bound to take consueance of the acts of his predecessor. And it is usual in other cases for one man to answer for the acts of another.

5 Co. 100. b. *Penruddock's case.* *Quod permittat* against a feoffee for a nuisance erected by his feoffor.

2 Cro. 373. *Rippon versus Bowles*, 1 Roll. Rep. 222. If I have a way over the land of J. S. who stopp it, and then let it to J. D. for years, I may have an action against the lessee, and notice is not material. 3 Cro. 918. *Prince versus Allington.*

4. The inconvenience which would otherwise fall out; for the defendant should be thus imprisoned, and have no remedy for the wrong, for the bailiff may be dead, or the arrest might be by a deputy, or person insolvent; and no inconvenience on the other side, for he may take security that he shall be charged with no prisoners, but what shall be legally committed.

* *Hinchcliffe and a great many others against The Lady Beaumont.* Ebor. P. 425.

THE lady Beaumont libels in the ecclesiastical court of Prohibition. the archbishop of York against *Hinchcliffe*, and a very great many others named in a schedule affixed to the said libel, and derives her title to the tithes of *Criglington*, a vill within the parish of *Sandal*, under a grant from the crown of the appropriation of *Sandal magna*. The inhabitants pray

Term. Hill, 32 & 33 Car. 2. B. R.

pray a prohibition, and join in a suggestion of a *Mortus*, to pay for all tithe hay 16s. 6d. and so much for a cow, and so much for a calf, to the vicar of *Sandal magna*; and it appearing plainly that the plaintiff in the ecclesiastical court ought to be prohibited, the great question was, Whether they may have one writ of prohibition, or whether they ought to sever, and have several writs? And upon examination of the cases of *Yelverton* 128. *Burges* and *Dixon* versus *Ashton*. *Noy* 131. 1 *Leon*. 286. pl. 388. Sir *Gulbert Gerard* versus *Shering*. *Owen* 13. *Bartue's* case, and 106. *Worfeley* versus *Charpocke*, and 3 *Cro.* 472. the case of an *Audita Querela*, We resolved the parties should bring several writs; for so had been the course of this court formerly, and therefore we would not alter it, though some of the judges of the common pleas (with whom my brother *Dolben* had discoursed, as he said) said, We might grant one writ for all.

John Wilson versus Dyson, Kipping and Davenant.
Middlesex.

Devise.

EJECTMENT of the demise of *Francis Kipping*. Upon Not guilty pleaded, a special verdict finds that *Francis Kipping* father of *Kipping*, lessor of the plaintiff, had issue the said *Francis Kipping*, *Thomas* one of the defendants, *Gerard*, *Anne*, *Susan* and *Elizabeth*, and made his will in these words:

I give my wife all that messuage called the *White Hart*, together with four acres of land called *Aplands*, in the parish of *Tottenham*, &c. She out of the rents and profits thereof breeding and educating all my children. Item, I give to my third son, *Gerard Kipping*, after my wife's decease, all the said premisses, to him and his heirs for ever. Provided always, and upon condition, that my said son *Gerard* shall pay unto my daughter *Elizabeth* 100l. within six months after my wife's death, and his age of twenty-one years; and for default of payment thereof accordingly, I give the said premisses to my said daughter *Elizabeth* and her heirs. And farther, my will and meaning is, That if my said son *Gerard* happen to die without issue, my daughter *Elizabeth's* 100l. being first paid, then the remainder of his estate to be divided amongst my sons and daughters, and the survivors of them. And lastly, I make my said wife executrix, to whom I give all the residue of my estate, my debts and legacies

* P. 426.

Term. Hill. 32 & 33 Car. 2. B. R.

gacies being first paid, desiring her to be careful in bringing up my children.

Susan the wife immediately after the death of the devisor entered, and enjoyed the premisses during her life, and educated and maintained the children according to the said will.

Afterwards the said *Susan*, and *Anne* one of the daughters, died without issue.

Gerard after the death of his mother entered, and had issue *Francis Kipping* his only son, and no other issue, and died seised before his age of twenty-one years.

Francis the son of *Gerard* died before the said *Gerard* could have attained to the age of twenty-one years without issue.

Charles Dyson, one of the defendants, in the life of the said *Gerard* married *Susan* one of the daughters of the said *Francis* and *Susan*; and *William Davenant* married *Elizabeth* aforesaid.

The 100*l.* bequeathed to the said *Elizabeth* was not paid to the said *William* and *Elizabeth*, or either of them, by the said *Gerard* in his life-time, or by the said *Francis* his only son.

The said *Francis Kipping* lessor of the plaintiff, and *Charles Dyson* in the right of his wife, and *Thomas Kipping* after the death as well of the said *Gerard* as of the *Francis*, only son of the said *Gerard*, and before the said *Gerard* could have attained to his age of twenty-one years, if he had lived, did equally pay the said 100*l.* to the said *William* and *Elizabeth*, viz. each of them an equal proportion, and that thereupon the said *Charles Dyson* entered in right of his said wife.

Thomas Kipping and *William Davenant* in right of his said wife entered into the said three parts.

* *Francis Kipping* lessor of the plaintiff is heir of the said * P. 427.
Gerard, and of his said only son *Francis*, and that after payment and entry last mentioned, he in and upon the possession of the said *Charles Dyson*, *Thomas Kipping* and *William Davenant* did enter, and demised to the plaintiff, upon whose possession the defendants entered; and after several arguments at the bar, it was adjudged for the defendant; for that *Gerard* had but an estate-tail, and by the words, *If my said son Gerard happen to die without issue, my daughter Elizabeth's 100*l.* being first paid, then the remainder of his estate to be divided amongst my sons and daughters, and the survivors of them*, the testator intended that all his estate in the

Term. Hill. 32 & 33 Car. 2. B. R.

the lands should be divided amongst his sons and daughters, taking out thereof only 100*l*. for his daughter *Elizabeth*, which she should have over and above her proportion of the said lands.

Brown versus Cutter. Ejectment. Special Verdict. Surry.

Devise.
2 Show. 152.

JOHN CHEEK had issue four sons, *Humphry*, *Robert*, *Anthony* and *John*, and 6 March 1589. 32 Eliz. made his will in writing thus :

First, I will that my wife shall have and enjoy all my houses, &c. in *Thames Ditton* during her natural life, if she do not marry ; but if she do marry, then I will that my son *Humphry* shall presently after his mother's marriage enter and enjoy the said premisses, to him and the heirs male of his body, and for default of such issue, to my son *Robert* and the heirs male of his body, with remainders to his other sons, and so over to strangers.

21 October 1590. *John Cheek* the testator dies, his wife *Isabel* enters, and 20 August 1597, dies. *Humphry Cheek* enters, and hath issue two sons, viz. *William* his eldest, and *Robert* his second, lessor of the plaintiff.

14 June 1632, *Humphry* died seised, and *William* entered, and became seised *prout lex*, and had issue *John*, and *Mary* wife of *Benjamin Cutter* the defendant.

14 September 1661, *John* died without issue before his father.

18 June 1677, *William Cheek* died seised; *Mary* entered. July 1677, *Robert Cheek* lessor of the plaintiff entered.

* P. 428. * And judgment was given for the plaintiff; and our opinions were delivered by my brother *Jones*. The reasons of my opinion were as follow.

1. The intention of the devisor being the pole-star that ought to guide the judges in the exposition of all wills, 'tis necessary to consider, what estate the testator intended for his wife by his will. And I am of opinion, that he intended her an estate only *durante viduitate*, which the lord *Coke* says, *Co. Lit. 42. a.* is in judgment of law an estate for life determinable, and in pleading the grantee shall say that by virtue thereof he was seised for life; which being premised, the question will be, Whether by the will she hath an estate *durante viduitate* ? The words whereof are, *I will that my wife shall have and enjoy all my houses, lands, &c. during her natural life, if she do not marry*; and I do conceive they

they are so much and no more; for what is an estate during widowhood, but an estate to continue till she doth marry? And such an estate is not tied up to the words, *durante viduitate*, as exchange, warranty, frankmarriage, frankalmoin, &c. but any description thereof will satisfy; which being so, then the words, *But if she do marry after my death*, is no more than, in case the estate shall determine, then I will that my son Humphry shall presently enter, &c. by which it is most plain, that here is no contingent remainder, but an estate vested in *Humphry* to take effect in possession upon the marriage or death of the wife.

2. That the intent of the deviser was such, appears by the limitation; for he intended that the lands should go to his sons, and their issues male, and not to the females, which would not be, if this should be a contingent remainder; and such intention hath been in all ages regarded, in esteeming of issue male. 1 Reg. 21. 21. *Interficiam de Achab mingerem ad parietes*, Plowd. 305. Now this intention would not be attained without much improbability. 1. Because of the age of the wife, for she had four sons at the time of making this will, and her great grandson was born within less than forty years afterwards, as appears by the record, and so she could not be very young, and consequently not inclinable to marry. 2. By her marriage she would lose this estate, which for aught appears by the record, was all her subsistence, both which were sufficient restraints of her marrying again without which the testator's intent would not be completed.

Object. It hath been objected, That the meaning of the testator could not have been expressed more plainly for a contingent remainder, that *Humphry* should have a fee-
 * P. 429.
 simple if his wife did not marry.

Resp. It might have been much more plainly expressed, to have said, *If she do not marry, living Humphry, Then, &c.* as *Pell* and *Brown's* case was, or by a more large description of all the circumstances of his intention.

Object. By this construction the eldest son would have less power of his estate than the younger, if his mother had survived him, because he could not have made an estate in fee by a recovery.

Resp. That disability arises not from the estate given, but from the collateral accident of the mother's surviving, and so it is in all vested remainders where is a tenant for life in being; and here the mother might have survived all the remainders.

Term. Hill. 32 & 33 Car. 2. B. R.

As for authorities, though they cannot be expected in case of a will to be very direct, yet to me these seem pretty apposite, viz.

Moor 486. pl. 686. Holcroft's case, sir John Holcroft seised in fee, covenants to levy a fine to the use of himself for life, the remainder to his son sir John for life, until he attempt to alien, and then to Hamlet Holcroft, during the life of sir John, jun. the remainder to sir John the younger's first, second, third and fourth sons successively, and the heirs male of their respective bodies, the remainder to the said Hamlet in tail male. Sir John, sen. dies, sir John, jun. had only one son, who dies, and then sir John the younger dies. *Resolved*. 1. That Hamlet had an estate in remainder presently. 2. Though sir John the younger had but one son, yet the remainder in tail vested in possession in Hamlet after the death of the said sir John the younger without issue.

2 Cro. 696. *Jones 56. Foy versus Hinde. Martin Keilway* seised in fee, gives his lands, after his death without issue male, to Henry Keilway in tail male, until he or they make any acts to alter or discontinue this estate-tail, and then to Thomas Keilway and the heirs male of his body, with several remainders over. The deviser dies without issue, Henry enters, Thomas dies leaving issue Richard, Henry levies a fine, Richard enters. It was objected, that Richard could not enter, because the remainder devised to his father was contingent, viz. to arise upon Henry's alteration of the estate, and not before, and then Thomas dying before the contingent happened, the remainder could not vest. But resolved, The remainder to Thomas was not contingent, but

* P. 430. an immediate * devise, because, should it be contingent, the deviser's intent would be destroyed, which was that every one in remainder, successively, should enjoy the land; and so in the case at bar; and judgment was given by the whole court, except Serog's chief justice, who was absent, and sate not at any time this whole term.

Memorand. 12 February, being the last day of this term, sir Creswel Levinz, attorney general, was made serjeant, and gave rings, *Cujus inscriptio fuit, Regi servire, Jura servare*. He kept his feast in the hall of Serjeants Inn in Chancery-Lane, where was no nobleman but the lord privy seal, earl of Anglesey. His coif was put on, and he counted in the treasury of the Common Pleas, so soon as he was sworn at the Chancery Bar; and the lord chief justice North sent to the

Term. Pasch. 33 Car. 2. B. R.

the judges of B. R. to be present; but our business would not permit us.

Memorand. 23 March, sir Richard Weston knt. puisne baron of the Exchequer, died at his house in Chancery-Lane.

Berning *versus* Follat. *Midd.*

DEBT upon an obligation, conditioned to pay money Lien.
upon the plaintiff's delivering over to the defendant some receipts which would effect infallible cures of the pox, and other diseases. The defendant pleads, that the plaintiff did not deliver over the said receipts; which plea upon demurrer was ruled naught, and judgment seemed to be for the plaintiff; and then an exception was started, That the action is brought in *Middlesex*, and the bond itself, as appears upon the record, is dated in *London*. And Coke upon *Littleton* 6. a. The putting of a place for the date of the deed is disadvantageous to the feoffee; for being in general, he may alledge the deed to be made where he will; by which is to be collected, That if the place be added, he cannot alledge it to be made in any other place than where it is alledged. *Et adjournatur. Vide Bro. Debt* 46. *Faits* 95. *Obligation* 97. 48 E. 3. 2, 3.

* Term. Pasch. 33 Car. 2. B. R. * P. 431.

Johnson *versus* Taylor.

ERROR in *Boston* to reverse a judgment given there Error,
upon a *Scire facias* grounded upon a recognizance entered into by the defendant, as bail for one *Townsend* at the suit of the plaintiff. The court of *Boston* do certify not only the judgment upon the *Scire facias*, but also the principal judgment, and all proceedings therein; and resolved
good

Term. Pasch. 33 Car. 2. B. R.

good enough, because, if they should certify only the judgment in the *Scire facias*, it could not well be understood by this court, because in inferior jurisdictions there are not several rolls to enter the judgment for the principal, and another for the *Scire facias*, and another for bails; but all proceedings as well against defendants as against the bail are entered (for the most part) in a book, and never entered at large unless when a writ of error is brought, and then they make up an entire record, and not otherwise; and judgment was affirmed.

Memorandum, April 23, 1681, 33 Car. 2. sir Thomas Street knight, serjeant at law, was sworn one of the barons of the Exchequer in the place of sir Richard Weston deceased, and sir Robert Wright knt. serjeant at law, was sworn chief justice of Glamorgan circuit in South Wales, in the place of serjeant Street.

Mandamus.
Trem. 454.

A MANDAMUS was directed to *William Stephens*, gent. mayor of the borough of *Saltash* in the county of *Cornwal* to swear *Mathew Veal* into the place and office of mayor of the said borough being duly elected, *Ret. die Sabbati prox. post mensem Michaelis.* The said *Stephens* returns thus, viz. *Quod ante adventum hujus brevis mihi direct. necnon ante emanationem ejusdem brevis, scilicet, 29 Septembris 32 Car. 2. Ego præd. Willielmus Stephens a loco & officio Majoris Burgi de Saltash in Com. Cornub. præd. amotus fui. Et quidam Andreas * Willoughby Gen. existen. un. Aldermannor' & liberorum Burgens. Burgi præd. eodem 29 die Septemb. anno supradicto in loco & officio Majoris Burgi de Saltash in Com. præd. elect. constitutus admiss. & jurat. fuit. Ac deinceps hucusq; fuit & adhuc est Major Burgi præd. & ratione officii sui a tempore constitutionis & admissionis suæ præd. ad officium illud hucusq; habuisset & modo habet in custodia sua commune sigillum Burgi de Saltash præd. ratione cujus ego præd. Willielmus Stephens ipsum præd. Matheum Veal secundum exigentiam brevis præd. jurare seu admittere non potui. And resolved by the whole court, that this return is insufficient, because it doth not answer the gist of the writ; for by such a return any officer may be kept out, for the party may procure another to be chosen before the party elected can procure a writ; and therefore the defendant ought to have returned, that *Veal* was never elected, and so *Veal* might have had an action for his false return; and so the court awarded a new writ to *Stephens* to swear and admit the said *Veal*.*

By

Term. Pasch. 33 Car. 2. B. R.

By the act of 13 & 14 Car. 2. cap. 2. concerning the repairing the highways about *London* and *Westminster*, which is now expired, It was enacted, Sect. 11. In case any person shall propose to carry away the ashes, dirt, and other filth, for all or any of the places aforesaid, at less rates than the yearly raker or undertaker can or will perform the same, the said commissioners shall have power, and are hereby authorised to contract with such person, and for such term as they shall think fit; the said commissioners by deed poll under their hands and seals did dispose to *Windsor Sandys*, esq; the employment of raker, or general undertaker, for cleansing of the streets, lanes and other open passages of each ward and division within the parish of *St. Giles in the Fields*, and *St. Martin in the Fields* in *Middlesex*, for the term of 21 years, of which term eleven years being expired, *Windsor Sandys* died, and his interest vested in his wife, who not being able to manage the said employment, invited *Thomas Row*, esq; to take it from her, and to buy out her interest, which he refused to do, without the consent of the said parishes; and thereupon he addressed himself to them, and acquainted the inhabitants of the said parish of *St. Giles in the Fields* with it at a general vestry, (whereof *Whitcomb* was one) who unanimously assented to *Row's* perfecting an agreement with the widow *Sandys*, and made an order of vestry for continuance of such their agreement with the said • *Row*, as they had before done with the said *Windsor Sandys*, and thereupon *Row* bought the widow *Sandys's* stock of horses and carts, to the value of 1000*l.* and entered upon the employment, and afterwards *Whitcomb* procured another vestry in the said parish, and there obtained an order contrary to the former, viz. That *Whitcomb* should have the employment, and caused the money raised by virtue of the scavengers rate to be stopped in the scavengers hands; and thereupon *Row* made application to the justices of the peace at the quarter-sessions, who ordered a reference to seven of them, who reported to them as is before-mentioned, and the court ordered that the money should be brought to the clerk of the peace, and *Row* to proceed in the said employment, and that the money be paid over to *Row*. Upon this *Whitcomb* obtained a *Certiorari*, and removed the order into this court, and upon opening of it, we were all of opinion, That the order was not good in law, because the justices of peace have nothing to do with contracts; but it seems probable, that the contract and lease made by the commissioners at *Scotland-yard* was good to *Sandys*, and went to the widow, and by her might be transferred to *Row*;

* P. 433.

By

Term. Pasch. 33 Car. 2. B. R.

Row; but we determined not that point, but referred the business to sir *Robert Sawyer* knight, attorney general, to end it, if he can, because the way of managing the cleaning the streets by such undertaking hath been very convenient; and we understood that *Whitcomb* was a man of small ability to carry on an employment of so great charge; and in the mean time the order to remain unquashed.

Phorbes's Case.

Error.
3 Danv. Ab.
3. p. 5.
2 Show. 160.

* P. 434.

JAMES PHORBES of the city of *Gloucester* gent. was indicted before the justices of peace in this manner, Civit' Glouc'. ff. Memorand' quod ad generalem Session' Pacis tent. apud Civit' Glouc' in Com' ejusdem Civit' 13 die Januarii anno Regni Domini Car. 2. &c. 30. coram Johanne Wagstaffe Arm' Duncomb Colchester Mil' &c. Justic' ipsius Domini Regis ad Pacem in Com' Civit' præd' conservand' necnon ad divers. felon' transgr. & alia malefacta in eadem Civitate perpetrat' audiend' & terminand' assign' per Sacramentum Francisci Singleton &c. bonorum & legalium hominum ad inquirend' pro dicto Domino Rege et pro corpore Com' præd' jurat' & onerat' præsentat' existit quod Jacobus Phorbes de Civit' Glouc' Gen' * 1 die Januarii 30 Car. 2. apud Civit' Glouc' præd' fuit ætat' sexdecim annorum & amplius ac non accessit, Anglice *did not repair*, Ecclesiæ Parochiali de Sancta Maria de Cript' infra Civit' præd' nec alicui alii Ecclesiæ Capellæ aut usuali loco Communis precation' nec ibidem fuit tempore Communis precationis ad aliquod tempus infra spatium sex mensium integrorum extunc prox' sequen' sed abstinuit ab eisdem, Anglice *hath forborn the same*, per spatium præd' in malum aliorum exemplum contra Pacem dicti Domini Regis nunc Coronam & Dignitatem suas &c. necnon contra formam statuti in hujusmodi casu nuper edit' & provis. Et super hoc facta hic in eadem Curia publica proclamatione pro Domino Rege secundum formam statuti quod præd' Jacobus Phorbes corpus suum redderet Vicecomitibus ejusdem Civitat' ante prox' generalem quarterial' session' tenend' pro Civitat' præd' Ante quam quidem general' quarter' session' scilicet 28 die Aprilis existen' prox' general' session' tunc tent' pro Civitate præd' post proclamation' sic ut præfertur fact' præd' Jacobus Phorbes corpus suum Vic' Civit' præd' non reddidit nec comperuit secundum formam & effectum cujusdam statuti in ea parte edit' & provis. sed defalt' fecit unde idem Jacobus Phorbes convict' est.

Upon

Term. Pasch. 33 Car. 2. B. R.

Upon this conviction, *Phorbes* brought a writ of error; and although the conviction was very vitious and erroneous; yet it being no judgment a writ of error doth not lie thereof; for the statute of 3 Jac. cap. 4. says, That after proclamation made, and upon every default recorded, the same shall be as sufficient a conviction in law of the said offence, as if upon the same indictment a trial by verdict thereupon had proceeded and been found against him or her and recorded; so that this is no judgment, but the statute gives process upon it for the forfeiture; and the party's remedy is in the exchequer to quash it there. The faults in the record are, 1. The session is held 13 January 30 Car. 2. and the party is indicted at that sessions for not coming to church from 1 January 30 Car. 2. for six months, which is all but thirteen days after the sessions held, and so impossible. 2. The indictment is *per sacramentum bonorum & legalium hominum*, but not *Com' præd'*, both which were held faults to have quashed the indictment, but not without first conforming, as that statute of 3 Jac. requires; and *Phorbes* was left to have his remedy in the exchequer.

* Haddock's Case.

* P. 435.

TIMOTHY HADDOCK brought a *Mandamus* directed to the mayor, aldermen, bailiffs and citizens of the city of *Carlisle*, to restore him to the place and office of one of the aldermen of the said city, who returns as follows, viz.

Corporation.
1 Vent. 355.
Trem. 523.

That the city of *Carlisle* is, and time out of mind hath been an ancient city, and that the citizens of the city aforesaid for the time being, time out of mind until 21 July 13 Car. 1. were incorporated in the name of mayor and citizens of the city of *Carlisle*, and that always to that time there were within the said city twelve of the most sufficient citizens of the said city for the time being, who were named *consiliarii*, alias *Aldermanni*, *Civitatis præd'*, and out of which one yearly was duly chosen, and sworn in the office of mayor of the said city for one whole year next following such election, and farther till one other of the twelve counsellors, otherwise aldermen aforesaid, should be chosen and made, and sworn mayor; and that every one of the said counsellors, alias aldermen, after that he should be chosen and sworn into the said office of counsellor, alias alderman, should continue therein during his life, if he should so long well behave himself.

D d

That

Term. Pasch. 33 Car. 2. B. R.

That from time out of mind, till the said first day of July 13 Car. 1. there were, and used to be other thirty-two good and sufficient citizens of the said city *e Gilda Mercatoria* there chosen, which together with the said other eleven counsellors, *alias* aldermen, not being mayor, were and used to be the common Council of the mayor and citizens of the said city.

That king *Charles* the First by his letters patent under the great seal of *England*, dated at *Canterbury* 21 July 13 Car. 1. did will, ordain, constitute and grant, that the said city from thenceforth should be a city of itself, and that the same should be from thenceforth incorporated by the name of mayor, aldermen, bailiffs and citizens of the said city of *Carlisle*.

That from thenceforward for ever there should be within the said city, one of the aldermen for the time being, who should be named mayor of the said city, and eleven besides the said mayor, who should be called aldermen, and two others of the said city, which should be called bailiffs, two other discreet men to be chosen, who should be called coroners of the said city, and four and twenty other men which should be called *Capitales Cives* of the said city, and should be of the common council, * and should be aiding the said mayor, aldermen and bailiffs for the time being.

That the said mayor, aldermen, bailiffs, and 24 *Capitales Cives*, or the greater part of them, whereof the mayor to be one, upon publick summons by the said mayor to be made, should in the *Guildhall* have power to make orders and by-laws for the good government of the city, and to have all amerciements and forfeitures thereby arising for their own use; and the king appoints *Richard Barewisse* esq; to be the first mayor, to continue so till *Monday* next after *Michaelmas Day* following, and from thence till another out of the said eleven aldermen should be chosen, if he should so long live; and the king likewise appoints eleven others by name to be aldermen, to continue in the said office during their natural lives, unless in the mean time for ill government, or for any reasonable cause by the mayor, aldermen, bailiffs and *Capitales Cives* for the time being, or the greater part of them, whereof the mayor to be one, he should be amoved. He also appointed two bailiffs by name to continue till *Monday* next after *Michaelmas*, and from thence till others should be chosen, if they should so long live, unless in the mean time they should be amoved for ill government, or any other reasonable cause. In like manner he appointed two coroners by name, and also twenty-four common-coun-

cil

Term. Pasch. 33 Car. 2. B. R.

citizens to continue so during their natural lives, unless removed for ill government, or for any other reasonable cause by the mayor, aldermen and chief citizens, or the greater part of them.

That the mayor, aldermen, and twenty-four *Capitales Cives*, or the greater part of them, without the assistance or help of other citizens might every year on *Monday* next after *Michaelmas Day* in the *Guildhall*, chuse one of the said aldermen to be mayor of the said city; and if the number of the choosers shall be equal, then the mayor to have a double voice.

That the mayor so chosen shall be sworn before his predecessor, if living, and if dead, before the aldermen, or greater part of them in the presence of the aldermen, bailiffs, and twenty-four, or so many of them as shall be present.

That after he shall be so sworn, he shall continue a year, or until another shall be chosen and sworn in his place.

That the said mayor, aldermen, bailiffs, and twenty-four shall on *Monday* next after *Michaelmas Day* choose two bailiffs yearly out of the citizens, who shall be sworn before the mayor, and other aldermen, and 24, and shall hold their places a year, and until others shall be chosen and sworn into their places.

* That if the mayor shall die within the year, then the aldermen, bailiffs, and twenty-four, or the greater part of them, shall choose one of the aldermen to be mayor, and shall continue so for the residue of the year, and till another shall be chosen, to be sworn before two aldermen; and if any of the said aldermen for the time being shall die, then the mayor and surviving aldermen, or the greater part of them, shall choose others in their places to be sworn before the mayor to continue so during his life. * P. 437.

That if the bailiffs, or either of them shall die, or be removed within the year, then the mayor, bailiffs, and twenty-four, or the greater part of them, shall choose another out of the citizens of the said city, to continue during the residue of the said year; and if any of the twenty-four shall die, or be removed, then the mayor and aldermen, or the greater part of them, shall choose others *de magis probis & discretis Civibus* into his place. The king also granted that the said mayor, aldermen, bailiffs and citizens should have a recorder, and named one to continue during the pleasure of the mayor, aldermen, &c. *prout per Literas Patentes (inter alia) apparet.*

That from time out of mind, to the time of making the said letters patent quilibet Consiliarius, alias Aldermannus, Civitat. præd. pro tempore existen. pro justa & rationabili causa fuit amobilis & amot. a loco & officio suo Consiliarii, alias Aldermanni, dictæ Civitat. per Majorem Consiliarios, alias Aldermannos, Civitat. prædictæ pro tempore existen. vel majorem partem eorum quorum Major pro tempore existens fuit unus. Et post consecution. Literarum Patent. præd. quilibet Aldermannus ejusdem Civitat. pro tempore existen. *by the mayor and aldermen of the said city for the time being, or the greater part of them, of which the mayor was one*, ob justam & rationabilem causam ab officio suo Aldermanni Civitat. præd. amobil. & amot. fuit & esse consuevit.

That the said *Timothy Haddock* 2 October 1673. was chose alderman, and took his oath well and faithfully to execute the said office to the effect following, viz.

Quod advisament. adjument. & consensus ipsius Timothei forent per ipsum dat. & loquit. ad omnia tempora extunc ad & cum majori parte Majoris & Consiliariorum Civit. præd. pro bona gubernatione & incremento boni publici ejusdem non respicien. aliquod propr. lucrum vel questum pro seipso vel aliqua alia persona in præjudicium opum, Anglice *of the wealth*, libertatis vel libertatum bonorum ordinum constitutionum vel consuetudinum ejusdem Civitat.

* P. 438.

quodq; non detegeret seu patefaceret * Anglice *disclose or discover*, alicui personæ vel personis ad aliquod tempus aliqua verba locutionis, Anglice *talks*, Communicationes vel Sermones mot. dict. vel audit. per ipsum vel aliquos socios Consiliarios suos assemblat. insimul in aliquo loco ad consulend. pro opibus, Anglice *the wealth*, vel bona gubernatione Civitat. præd. & condescenderet & agrearet ad omnes tales causas & materias quales Major & major pars socior. Consiliar. dicti Timothei ad inde agrearent, ac etiam ad ulterius potestatem supprimeret omnes tales personas quales conarentur facere aliquas factiones, Anglice *façions*, conspirationes vel aliquam confusionem, Anglice *disorder*, contra bonam gubernationem & constitutionem dictæ Civitat'.

That one *Thomas Jackson* being mayor, 6 October 31 Car. 1. a common council was held in the *Guildhall* of the city for the election of a mayor for the year ensuing, at which the said *Haddock* was present, who being then about to depart, the said mayor spoke to him, and requested him not to depart from the said council before the election made, but should attend the election according to his duty, and that the said *Haddock* instantly, contemptuously, and without any reasonable cause departed from the said council,

and

Term. Pasch. 33 Car. 2. B. R.

and afterwards the same day before the said election made came back again leading thither with him divers persons to the number of sixty of the inferior citizens of the said city, not having voices in the said election, to disturb the said election, and there did *tumultuose, riotose & minaciter* require the said mayor, aldermen, bailiffs, and capital citizens then assembled, that he and the persons he brought with him might together with the said mayor, aldermen, bailiffs and capital citizens so assembled as aforesaid, choose a mayor, contrary to the form and effect of the said letters patent, saying, and with a great noise clamouring and alledging the said letters patent concerning the election aforesaid to be void, to the great terror of the said mayor, aldermen, bailiffs and capital citizens so assembled as aforesaid; and the said *Timothy Haddock*, and all other the persons aforesaid, and by him brought with him at and by the instigation and procurement of the said *Timothy*, then and there in the presence of the said mayor, bailiffs and capital citizens for the cause aforesaid assembled, did so disturb the said mayor, aldermen, bailiffs and capital citizens with threats, complaints and clamours, that they durst not, nor could not, proceed in the said election for the space of two hours; and therefore afterwards, viz. 25 *October* then next following * in a council held in the *Guildhall* aforesaid before the said *Thomas Jackson* then mayor of the said city, and the greater part of the aldermen of the city aforesaid, it was ordered by the same mayor and aldermen then and there present, that the said *Timothy* should be summoned to be at a common council of the said mayor and aldermen in the *Guildhall* aforesaid, 8 *November* then next following to be held, to answer concerning his misbehaviour aforesaid, and to shew cause why he for the said misdemeanor should not be amoved from the place and office of alderman of the said city, at which said council the said *Timothy* appeared, and being spoke to by the mayor if he had any thing to say in excuse of the premisses, or could shew any cause why he ought not to be amoved from the office of alderman of the said city, said nothing in excuse of his said misbehaviour, nor shewed any cause why for his said offence he should not be amoved from his said office; and thereupon the said *Thomas Jackson* then mayor, and the said greater part of the said aldermen then present, did amove the said *Timothy Haddock* from his said office of one of the aldermen of the said city, and did declare him to be so amoved; and for that cause they cannot restore him. And we all held this return good; for though by the charter of

* P. 439.

Term. Pasch. 33 Car. 2. B R.

13 Car. 1. there is no power given for the corporation to remove an alderman, yet when the *consilarii, alias aldermanni*, were before the said charter removeable for reasonable cause, the same power still remains, for that the charter doth not merge or extinguish any of the ancient privileges; but the corporation may use them, as before; and if it should be otherwise it would be very mischievous for most of the corporations in *England*, who have taken new charters, but were ancient corporations before.

Carpenter's Case.

Churchwarden.

A MANDAMUS issued out of this court to sir *Thomas Exton* knight, commissary to the dean and chapter of *St. Paul's London*, to swear *Edward Carpenter* one of the churchwardens of the parish of *Stoke-Newington* in *Surrey*, he being thereto duly elected. But the doctor finding that there is a question between the parson and the parishioners concerning the election of the churchwardens, the parson claiming to appoint one by virtue of the canon, and the parishioners claiming a custom to choose both, makes * this special return to save himself from contempt, and also harmless from being liable to an action for a false return, viz.

* P. 440.

Quod causa sive querela coram nobis nunc pendet indicata inter *Sidracum Simpson* Clericum, Rectorem de *Stoke-Newington* in *Com. Midd. & Franciscum Staunton* Parochian. dictæ Parochiæ & Guardian. per dictum *Simpson* (ut asseruit) electum ex una parte & *Edwardum Carpenter* & *Thomam Terrey* Gardianos per Parochianos dictæ Parochiæ (ut asseruerunt) electos & alios Parochianos dictæ Parochiæ ex altera parte, in qua quidem causa differentia *Simpson* Rector allegavit se secundum Canonem in ea parte edit. & provis. dictum *Franciscum Staunton* elegisse in un. Gardianorum dictæ Parochiæ quia se præfat. Rectorem & Parochianos prædictos dissent. in electione Gardianorum ejusdem Parochiæ & Parochiani præd. allegarunt se secundum consuetudinem antiquam ejusdem Parochiæ eligend. ambos Gardianos elegisse dictum *Edwardum Carpenter* & *Thomam Terrey* in Gardianos dictæ Ecclesiæ quam consuetudinem dictus Rector negabat & desuper dicti Parochiani in se susceperunt ad proband. dictam consuetudinem & deder. allegation. in script. concept. quam nos admisimus. Et testes fuisse per dictos Parochianos product. & jurat. ad proband. dictam consuetud. & tempus eis assignat. ad eand. proband.

Term. Pasch. 33 Car. 2. B. R.

proband. sed dictos Parochianos neglexisse examinare & non adhuc examinasse dictos testes & dictum Rectorem virtute Juramenti sui negasse dictam consuetudinem, sed quamprimum Parochian. probaverint dictam consuetudinem nos erimus prompti & parati ad pronunciand. pro jure dictorum Parochianorum Et nos insuper humiliter certificamus unum e dictis Gardianis per dictos Gardian. elect. juramento oneravimus de fidelit. exequend. officium Gardian. dictæ Parochiæ. In cujus rei testimonium, &c. And we granted a writ to swear *Carpenter*, because the ecclesiastical court cannot try the custom of choosing the churchwardens, as is alleged 2 Roll. Ab. 287. F. pl. 51. *Shirley versus Brown*.

Englefield and Smith's Case.

MIDD. Berks ff. Alias scilicet die Lunæ proxim' Oath. post Crastinum Ascensionis Domini ult. præterit. coram Domino Rege apud Westm. per sacramentum 12 Jur. proborum & legalium hominum Com. præd. qui adtunc & ibidem jurat. & onerat. exist. ad inquirend. pro dicto Domino Rege & corpore Com. præd. præsentat. extitit quod Richardus Harrison * Miles & Valentin. Croome Arm. Justic. * P. 441. Domini Regis nunc ad pacem suam in & pro Com. Berks conservand. assign. virtute Commissionis dicti Domini Regis sub magno sigillo suo Angliæ eis direct. ad requirend. & recipiend. sacramentum Primaciæ, communiter vocat. *the Oath of Supremacy*, in quodam Statut. fact. in anno primo Elizabethæ nuper Reginæ Angl. inactitat. & specificat. de omnibus & singulis subditis dicti Domini Regis Romanæ superstitionis sectatoribus sive talit. reputat. 8 die Febr. anno 31 Car. 2. apud Reading in Com. præd. sacramentum præd. Henrico Englefield de Englefield in Com. Berks præd. Arm. Francisco Perkins de Upton in Com. præd. Arm. Richardo Perkins de Beenham in Com. præd. Gen. Nathaniel Smith de Woolhampton in Com. Berks præd. Gen. & Willielmo Stone de Southcot in Com. præd. Yeoman existen. & quilibet eorum existen. ætat. 16 annorum & amplius & subdit. dicti Domini Regis Romanæ superstitionis sectatoribus existen. & tunc commoran. & cuilibet eorum adtunc commoran. infra præd. Com. Berks obtulerunt & sacramentum præd. præstare & recipere requisiver. Et quod Henricus Englefield Franciscus Perkins Richardus Perkins Nathaniel Smith & Willielmus Stone sacramentum Primaciæ præd. communiter vocat *the Oath of Supremacy*, adtunc & ibidem præstare & recipere

& recipere penitus recusaver. & quilibet eorum recusavit in contempt. dicti Domini Regis nunc & legum suarum contra formam Statuti in hujusmodi casu edit, & provis. ac contra pacem dicti Domini Regis nunc Coron. & Dignitat. suas, &c.

Per quod præcept. fuit Vic. quod non omitt. &c. quin Venire fac. eos ad respondend. &c. Et modo scilicet die Veneris proxim. post Crastinum Sanctæ Trin. isto eodem Termino coram Domino Rege apud Westm. ven. præd. Henricus Englefield & Nathaniel Smith per Robertum Seylyard Attorn. suum Et habit. audit. indictament. præd. separatim dicunt quod ipsi non sunt inde culpabiles Et de hoc separatim pon. se super patriam Et Samuel Astry Arm. Coron. & Attornatus Domini in Cur. ipsius Regis coram ipso Rege qui pro eodem Domino Rege in hac parte sequitur scilicet, &c. Ideo præcept. est Vic. Berks quod Venire fac. coram dicto Domino Rege a die Sanctæ Trinitatis in tres septimanas ubicunq; &c. 12 &c. de visn. de Reading præd. per quos, &c. Et qui &c. ad recogn. &c. quia tam &c. Idem dies datus est tam præfat. Samueli Astry qui sequitur, &c. quam præd. Henrico Englefield & Nathaniel Smith, &c. Ad quas quidem tres septimanas Sanctæ Trinitatis coram dicto Domino Rege apud Westm. ven. tam præfat. Samuel Astry Arm. qui sequitur quam præd. Henricus Englefield & Nathaniel Smith per * Attorn. suum præd. Et Vic. Com. Berks præd. retorn. nomina 12 Jur. quorum nul. &c. And then a *distringas*, and a jury returned and impanelled find a special verdict by *Nisi prius* in *Berkshire*, to this effect, viz.

* P. 442.

That the said Sir *Richard Harrison* and *Valentine Croome* by virtue of a commission under the great seal of *England*, dated 23 *November* 30 *Car. 2.* and long before, and ever since were, and yet are justices of the peace of the county of *Berks*.

That the king granted a commission dated 23 *November* 30 *Car. 2.* in hæc verba. *Carolus Secundus, &c. omnibus & singulis custodibus pacis Com. nostri Berks salutem. Sciatis quod dedimus vobis & aliquibus duobus vel plur. nostrum potestatem & auctoritatem requirendi & recipiendi sacramentum, communiter vocat. the Oath of Supremacy, specificat. in quodam statuto 1 Eliz. fact. Ac etiam sacramentum, vulgariter vocat. the Oath of Obedience, specificat. in quodam altero statuto 3 Jac. fact. de omnibus & singulis subdit. nostris Romanæ superstitionis sectatoribus sive tal. reputat. Anglice Popish Recusants or so reputed, de quibus separal. sacrament. præd. vigore statut. præd. ac virtute hujus nostræ commissionis ullo modo respective requirantur*

Term. Pasch. 33 Car. 2. B. R.

requirantur & recipiantur in aliquo loco in dicto Com. nostro Berks commorantibus. Et ideo vobis firmit. mandamus quod in & circa præmissa respective diligenter intendatis. In cujus rei testimonium, &c.

That the said Sir Richard Harrison and Valentine Croome afterwards, viz. 13 March 31 Car. 2 Honorabili Willielmo Scrogs Mil. Capital. Justic. Domini Regis ad placita coram ipso Rege tenend. assign. & aliis sociis suis Justic. dicti Domini Regis ad placita coram ipso Rege tenend. assign. did certify, that the defendants refused to take the said oath, which certificate follows in these words.

* Com. Berks ff. Honorabili Willielmo Scrogs Mil. Capital. Justic. Domini Regis ad placita coram ipso Rege tenend. assign. & aliis sociis suis Justiciariis dicti Domini Regis ad placita coram ipso Rege tenend. assign. P. 443.

Nos quorum nomina subscript. sunt custod. pacis Domini Regis in Com. Berks Justic. dicti Domini Regis ad pacem ejusdem Domini Regis infra Com. Berks præd. conservand. Necnon ad divers. felon. transgr. & al. malefacta in eodem Com. perpetrat. audiend. & terminand. assign. certificamus quod virtute cujusdam Commissionis dicti Domini Regis sub magno sigillo suo Angliæ debito modo confect. geren. dat. apud Westm. 23 Novemb. jam ult. præterit. ac omnibus custodibus pacis dicti Domini Regis infra Com. Berks. præd. direct. 8 Febr. jam ult. præterit. apud Reading in Com. præd. obtulimus, Anglice *tendered*, juramentum Primaciæ, Anglice *of Supremacy*, mentionat. & express. in quodam statuto fact. 1 Eliz. nuper Reginæ Angliæ Henrico Englefield &c. separatim & adtunc & ibidem scilicet eodem 8 die Febr. nunc ult. præterit. Ac requisivimus eosdem Henr. Englefield &c. separatim præstare sacramentum præd. Et ulterius Certificamus quod ipsi iidem Henricus &c. adtunc & ibidem recusaver. & quilibet eorum separatim recusavit præstare sacrament. præd. In cujus rei testimonium manus & sigilla nostra &c. 13 March 31 Car. 2. Annoq. Domini 1678.

They find the act of Parliament 1 Eliz. intituled, an act to restore to the crown the ancient jurisdiction over the estate ecclesiastical and spiritual, and abolishing all foreign powers repugnant to the same; and the clause therein, who are compellable to take the oath, and the oath itself; and that all and every person and persons that at any time hereafter shall be preferred, promoted or collated to any archbishoprick or bishoprick, or to any other spiritual or ecclesiastical benefice, promotion, dignity or office, or ministry, or that shall be by your highness, your heirs or successors, preferred or promoted to any temporal or lay office, ministry or service

• P. 444

service within this realm, or in any your highness dominions, before he or they shall take upon him or them to receive, use, exercise, supply or occupy any such archbishoprick or bishoprick, promotion, dignity, office, ministry or service, shall likewise make, take and receive the said corporal oath before mentioned upon the *Evangelists*, before such persons, as have or shall have authority to admit any such person to any such office, ministry or service, or else before such person or persons, as by your highness, your heirs or successors, by commission under the great seal of *England*, shall be named, assigned or appointed to minister the said oath; and that it may likewise be farther enacted by the authority aforesaid, that if any such person or persons, as at any time hereafter shall be promoted, preferred or collated to any such promotion spiritual or ecclesiastical benefice, office or ministry, or that by your highness, your heirs or successors shall be promoted or preferred to any temporal or lay office, ministry or service, shall and do peremptorily and obstinately refuse to take the same oath so to him to be offered, that then he or they so refusing shall only be judged disabled in the law to receive, take or have the same promotion spiritual or ecclesiastical, or the same temporal office, ministry or service within this realm, or any other your highness dominions, to all intents, constructions and purposes.

That by another act 5 Eliz. intituled, an act for assurance of the queen's royal power over all estates and subjects within her dominions, the clauses containing who shall take the said oath.

And be it enacted by the authority aforesaid, that the lord chancellor or keeper of the great seal of *England* for the time being, shall and may at all times hereafter by virtue of this act, without any farther warrant, make and direct commission or commissions under the great seal of *England* to any person or persons, giving them or some of them thereby authority to tender and minister the oath aforesaid to such person or persons, as by the aforesaid commission or commissions the said commissioners shall be authorised to tender the same unto.

They find also the next clause expressing the penalty for the first refusal of the said oath, and the clause of certificate of refusal into the King's Bench, and concerning the indictment of the offender.

That the defendants 23 November 30 Car. 2. and 8 Febr. 31 Car. 2. were not any officers or ministers mentioned in the said statute of 1 or 5 *Eliz.*

That

Term. Pasch. 33 Car. 2. B. R.

That there was no other commission made to the said *Harrison and Croome* to tender the said oath to the said defendants; and the jury conclude, *Et si* the defendants are guilty or not *petunt advisamentum Curie*.

And the points intended in this special verdict were three, viz. 1. The words of the act of 5 *Eliz. cap. 1.* being, *that the lord Chancellor, &c. shall, &c. make, &c. commission, &c. to any person or persons, giving them or some of them thereby authority to tender and minister the oath aforesaid to such person or persons, as by the aforesaid commission or commissions the said commissioners shall be authorized to tender* * the same oath unto, whether the commission specified in the record be pursuant to the said act, for it is not directed to any persons particularly, nor to tender the said oath to any persons by name; and if it shall be in the commissioners discretion to tender it as they shall think fit, they shall take upon them to judge who are *Romanæ superstitionis sectatores*, or so reputed; and though several commissions were made out about the same time of the same term with this, yet the lord Chancellor did cause new commissions to be made out, expressing the names of the persons to whom the oath should be tendered; and this objection was raised by the lord chief justice *Scrogs* before whom the verdict was found; but it was resolved by the other three judges (myself doubting) that this commission was very good, because the power is left to the commissioners to choose whom they will tender the oath unto by the clause of the act; and in this manner were the ancient commissions shortly after the statute made. * P. 445.

The exception was, *that the indictment sets forth a certificate from the commissioners under their hands, but not under their seals*, as the statute requires; but to this the court answered, that in regard the certificate is found in *hæc verba* in the verdict to be under their seals, it shall be amended, and so good enough; and it was amended accordingly.

The third exception was, *the certificate is directed only to the judges by name, and not to the king in his court of King's Bench*, as the act requires; but resolved by the said three justices, that that is good enough, because it shall be intended that the said judges made the court, and were therein sitting at the time of the certificate: but I also doubted of this answer; but the judgment was given against the defendants. And as to the finding that the defendants were none of the officers or ministers mentioned in the several statutes of 1 and 5 *Eliz.* the whole court were of opinion, it was not material, because by the clause of 5 *Eliz.* empowering

Term. Pasch. 33 Car. 2. B. R.

ing the lord chancellor to make out commissions, all persons, though not officers, may be offered the said oath if the commissioners think fit.

* P. 446.

* Taverner's Case.

Mandamus.

JEREMIAH TAVERNER, having been chosen into the livery of the company of vintners in London, had a *Mandamus* directed to the master, wardens and assistants of the said company to admit him to be a livery-man according to his said election, to which they return,

That London is an ancient city, and that the citizens and freemen thereof time out of mind were, and still are incorporated, as well by the name of mayor and commonalty of the city of London, as by the name of mayor, commonalty and citizens of the city of London, and that of the said citizens there were several societies, guilds and fraternities, of which the company of vintners is and always hath been one.

That in the said society there have been time out of mind certain men being citizens and freemen of the said city and company, called livery-men, who were used to be chosen for the said company.

That the said company of vintners (as other companies) for the preservation and maintenance as well of the honour, as state and government of the said city, as well at times of publick meeting and attendances of the mayor and aldermen, and other publick occasions, and for the preservation of the honour and reputation, and government of the said company, and for the relief of the poor members thereof, have been forced to expend great sums of money.

That the said company of vintners have been anciently incorporated, and called by divers names; and that the 2 Feb. 9 Jac. the king by his letters patent incorporated them by the name of master, wardens, and freemen and commonalty of the mystery of vintners of the said city of London, and that they may make by-laws.

That time out of mind the place and office of the livery hath been a place and degree of pre-eminence in the said company; and that as well before and since the said letters patent every fellow of the said company, who was elected into the place and office of one of the livery was used, and ought to be *Idoneus homo, ac de bono statu & substantia qui bene potuit & ad vel ante admissionem suam per totum tempus præd. usus fuit & consuevit & debuit solvere pro & erga meliorem*

Term. Pasch. 33 Car. 2. B. R.

*liorem & necessariam supportationem & sustentationem societatis
præd. & necessaria onera & expensa inde certam competen.
denariorum summam.*

* That without the assistance and relief which the said * P. 447.
company by such payments hath had and received, it could
not maintain its government and reputation.

That for many years before the 24 April 1656, the sum
of money which every livery-man upon his admission paid,
exceeded 31*l.* 13*s.* 4*d.* and then a by-law was made, that
the payment should be so much only; and from that time
the said sum hath been always paid by every one admitted
into the livery.

That 18 June 1680, *ante adventum brevis præd.* he was
chose to be a livery-man, and was then required to take the
said office upon him, and that the master, wardens and
company were ready to admit him to the place of a livery-
man upon payment of the said sum of 31*l.* 13*s.* 4*d.* which
he ought to pay according to the by-law afore-mentioned;
but he hath refused so to do, and thereupon the company
refuse to admit him until he shall pay the same.

Upon this return the counsel for *Taverner* argued, that
the by-law therein mentioned for imposing 31*l.* 13*s.* 4*d.* upon
every livery-man was unreasonable and against law, and a
grievance to the subject: but the court resolved, Were the
sum more or less, it could not make the by-law void, for it
is to bind only the members of the corporation; and when
a man will agree to be of a company, he doth thereby sub-
mit himself to the laws thereof, and we are not to take no-
tice of the extravagancy of charges they lay upon themselves.
And 'tis convenient that the company have such power to
keep up their reputation, and the honour of the city of
London; and so allowed the return to be good.

The Case of the Town of Winchelsea.

Certiorari.
2 Lev. 86.
Trem. 556.
3 Keb. 154,
324

A CERTIORARI was granted to the mayor, jurats and commonalty of the ancient town of *Winchelsea* in *Sussex*, to remove an order or decree made by them; who made this return: *viz.*

That there have been time out of mind in *Kent* and *Sussex* five ancient towns, *viz.* *Hastings*, *Sandwich*, *Dover*, *New Romney* and *Hith*, which have been always called the Cinque Ports of the kingdom; and that in *Sussex* there are, and always have been two other ancient towns called *Rye* and *Winchelsea*, which are members of the said Cinque Ports.

That the said town of *Winchelsea* hath been time out of mind incorporated by the name of mayor, jurats and commonalty of *Winchelsea*.

That all the said Cinque Ports with their members have been time out of mind places for ordering provision, and preservation of shipping of the kings and queens of this kingdom of *England* for the time being; and that by reason of their situation upon or near the sea-shores, the inhabitants and residents thereof, as well for safe keeping the said towns, as of the said kingdoms of *England* against foreign invasion of enemies, have always and ought to keep beacons, watch-houses and guards night and day, as well by sea as land; and for better maintenance thereof, the said town of *Winchelsea* in their common hall used to make taxes and rates upon every inhabitant or occupier of house or land, lying or being within the said town or liberties thereof, which said privileges were confirmed by *Magna Charta*.

That 1 *May* 32 *Car.* 2. they made a tax of 6*d.* per pound for the maintaining of the said beacons and warehouses according to a schedule annexed to the said tax, and that there was no other order or decree. And set out the schedule.

And to this schedule was objected, That 'tis not set forth
that

that the beacons or watch-houses were in decay or out of repair, and so the rate unnecessary.

* But resolved, It is well enough; for 1st, 'Twould be dangerous to expect till they became in decay, for then there must be no beacon till repaired, nor no watch-houses in the mean time, which would be dangerous for the place. 2. 'Tis to be presumed that the inhabitants will not tax themselves unnecessarily, and they do all concur in the taxation: And so the order was confirmed. * P. 449.

Richard Sheldon *versus* Michael Clipsham.

Assumpsit.

THE plaintiff declares in an *Indebitat' Assumpsit* for Pleading. 100*l.* received to the plaintiff's use; and also upon an *Insimul Computasset* for another 100*l.* the same day. The defendant pleads, that the said several sums of 100*l.* in the declaration respectively specified, are for one and the same cause of action for one sum of 100*l.* only, and not for several sums of 100*l.* and that after the time of the said several promises respectively specified, *viz.* such a day, the defendant paid to one *Bellamy* by the plaintiff's order 30*l.* in part of payment and satisfaction of the monies in the declaration specified; and that the defendant in full payment and satisfaction of the said monies demanded by the plaintiff in his declaration did then become bound to the plaintiff in a bond of 120*l.* conditioned for payment of 65*l.* to the plaintiff at a certain day in the said condition specified as yet not incurred; which 30*l.* and bond the plaintiff accepted; *Et hoc parat', &c.* 2 Jon. 158.

Upon this plea the plaintiff demurred, and the whole court were of opinion that the plea is good; for though 'tis frequent to lay a declaration for a debt several ways in an *Assumpsit*, and 'tis not a good plea to say that the several sums are but only for the sum first mentioned, and so go no farther; yet when the defendant pleads over, that the very sum demanded is satisfied, 'tis a good plea; and if that the two several hundred pounds were two distinct sums, the plaintiff might have replied so, and taken issue thereupon. But he admits that there was but 100*l.* due, and that satisfied, the plea is good. But at the importunity of the plaintiff's counsel we gave him leave to waive the demurrer, and take issue upon the satisfaction, upon paying to the defendant his costs.

Elizabeth

• P. 450.

* Elizabeth Case *versus* James Barber.

Accord.
1 Danv. Abr.
77. P. 4.
241. P. 19.
2 Jon. 158.

THE plaintiff declares in an *Indebitatus Assumpsit* for 20*l.* for meat, drink, washing and lodging for the defendant's wife, provided for her at the request of the defendant, and lays it two other ways. The defendant pleads that after the making the said promise, &c. and before the exhibiting the said bill, viz. such a day, it was agreed between the plaintiff and the defendant and one *Jacob Barber*, his son, that the plaintiff should deliver to the defendant divers clothes of the defendant's wife then in her custody, and that the plaintiff should accept the said *Jacob*, the son, for her debtor for 9*l.* to be paid as soon as the said *Jacob* should receive his pay due from his majesty, as lieutenant of the ship called the *Happy Return*, in full satisfaction and discharge of the premisses in the declaration mentioned; and avers that the plaintiff the same time did deliver to the defendant the said clothes, and that she accepted the said *Jacob* the son, her debtor for the said 9*l.* and that the said son agreed to pay the same to the plaintiff accordingly; and that the said *Jacob* afterwards, and as soon as he received his pay as aforesaid, viz. 27 April 32 Car. 2. was ready and offered to pay the said 9*l.* and the plaintiff refused to receive it; and that the said *Jacob* hath always since been, and still is ready to pay the same, if the said plaintiff will receive it. *Et hoc paratus*, &c. The plaintiff demurs. And it was alleged by the defendant's counsel that the plea is good; for though in *Peyto's* case, and formerly it hath been held, that an accord cannot be pleaded unless it appears to be executed, 9 Co. 79. b. 3 Cro. 46. pl. 2. yet of late it hath been held that upon mutual promises an action lies, and consequently there being equal remedy on both sides an accord may be pleaded without execution as well as an arbitrement, and by the same reason that an arbitrement is a good plea without performance; to which the court agreed; for the reason of the law being changed, the law is thereby changed; and anciently remedy was not given for mutual promises, which now is given; and for this reason, *Mich. 18 Car. B. R. Palmer versus Lawson*, ante. In *indebitatus Assumpsit* against an executor upon a contract made by the testator; the defendant pleads judgment in debt upon simple contract against him for the debt of the testator, and after argument * removed a good plea; because though in debt against an executor upon a simple contract the defendant may demur,

* P. 451.

Term. Mich. 33 Car. 2. B. R.

mur, yet when he admits the demand, and executors are now liable to pay such debts in action upon the case, the judgment so obtained was pleadable; so *Vaughan Rep. Dee versus Edgcomb.*

But in this case at bar judgment was given for the plaintiff for two reasons.

1. Because it doth not appear that there is any consideration that the son should pay the *gl.* but only an agreement without any consideration.

2. Admit the agreement would bind, yet now by the statute of frauds and perjuries, 29 Car. 2. this agreement ought to be in writing, or else the plaintiff could have no remedy thereon; and though upon such an agreement the plaintiff need not set forth the agreement to be in writing, yet when the defendant pleads such an agreement in bar, he must plead it so as it may appear to the court, that an action will lie upon it, for he shall not take away the plaintiff's present action, and not give him another upon the agreement pleaded.

* Term. Mich. 33 Car. 2. B. R.

* P. 452

Charles Holmes *versus* Elizabeth Meynel.
Ejectment. Derby.

OF the demise of *Francis Meynel* of the moiety of the manors of *Meynel-Langley* and *Kirk-Langley* 300 messuages, 500 acres of land, 200 acres of meadow, and 500 acres of pasture in *Meynel-Langley* and *Kirk-Langley*. Upon Not guilty pleaded, the jury find a special verdict, viz.

That one *Isaac Meynel* was seised in fee entirely as well of the manor of *Meynel* and *Kirk-Langley*, as of all the tenements in the declaration, 2 Novemb. 1675. made his will in writing thus: I give and devise all my lands in *Meynel* and *Kirk-Langley* in the county of *Derby* unto my two daughters *Elizabeth* and *Anne Meynel*, and their heirs, equally to

E c

Estate.

3 Danv. Ab.

238. p. 2.

2 Jon. 172.

2 Show. 136.

Pollexf. 425.

Skin. 17.

be divided betwixt them: and in case they happen to die without issue, then I give and devise all the said lands to my nephew *Francis Meynel*, eldest son of my brother *William Meynel* deceased, and to the heirs male of his body; and for want of such issue, to *William Meynel*, brother of the said *Francis*, and the heirs male of his body, the remainder to *Godfrey Meynel*, brother of the said *Francis* and *William* in tail male, the remainder to *John* brother of the said *Francis*, *William* and *Godfrey* in tail male; and for want of such issue I give and devise the said lands to the next heir male of the name and family of the *Meynells*, and died without issue male, having issue *Elizabeth*, now defendant, and *Anne*, his two only daughters, who entered and became seised *prout Lex*, &c. *Anne* died without issue, *Francis* the lessor of the plaintiff entered.

And if for the plaintiff, for the plaintiff, &c.

After several arguments at the bar, the court by the mouth of the chief justice gave judgment for the defendant. I had prepared my argument, as the rest of the judges had done; but in regard we were all unanimous, it was thought needless for us all to argue. My argument follows.

In this case two points have been raised.

* P. 453.

- * 1. What estate *Elizabeth* and *Anne* have by this will.
- 2. Whether upon the death of *Anne* without issue *Francis* in remainder takes any thing?

As to the 1st, I conclude that *Elizabeth* and *Anne* have several estates-tail by moieties; for though the devise be to them and their heirs in the beginning, yet when the will afterwards says, *And if they die without issue*, it shews that (*heirs*) was intended heirs of their bodies: so it hath been construed in grants.

5 H. 5. 6. a. Lands granted to man and his wife, & *alii* *heredibus* of the husband, if the heirs of the husband and wife shall die *sine heredibus de se*, the husband and wife had an intail: *A fortiori* in a will, 2 Cro. 448. *King* versus *Rumbal*, where many books are cited; and *Bridgman* 1. *Pell* versus *Brown*; so that as to this point, 'tis not much denied on either side.

As to the 2d point. I conceive *Francis* takes nothing upon the death of *Anne*, but that her part remains to her sister by way of a cross remainder.

1. I take notice that the main design and intent of the testator was, that in the first place he would take care of his own children, and then look after the continuation of his own name and family; for first he gives to his daughters, and afterwards the remainders to his nephews, then to the

next

Term. Mich. 33 Car. 2. B. R.

next heir male of the name and family of the *Meynells*, following herein the law of nature, and the ordinary course of the world.

That this was the intent appears by the words of the will: 1. *In case (they) die without issue, i. e. both of them, 'tis not they or either of them.* 2. *All the said lands*, which intends both parts, and not a moiety; and *All* cannot pass till both are dead without issue. And if the testator had been asked, what he meant by the lands going to his nephew after the death of his daughters without issue, he would have answered, that he should have the lands when both of his daughters should be dead without issue, and not before.

2. This intent consists with the rules of law, for 'tis a general rule, *That a will shall never be construed by implication to disinherit the heir at law, unless such implication be necessary, and not only constructive and possible*, 13 H. 7. 17. Br. Devise 52. A man devised his goods to his wife and after the decease of his wife, his son and heir shall have the house wherein his goods are; the son shall not have the house during the wife's life; for though it be not * expressly * P. 454. devised to the wife, yet by his intent it appears, that the son shall not have it during her life, and therefore it is a good devise to the wife by implication, and the devisor's intent: but if it were a devise to a stranger after the death of the wife, the heir shall have it during the wife's life, because it is not a devise to the wife by a necessary implication.

Hill. 20 & 21 Car. 2. C. B. *Gardiner versus Sheldon, Vaughan* 295. *William Rose* made his will thus, *My will and meaning is, that if it happen that my son George, Mary and Katharine my daughters, do die without issue of their bodies, then all my freeholds shall come, remain and be to my nephew William Rose and his heirs for ever.* Resolved the son and daughters had no estate by the will, and so are the books of *Moor* 7. pl. 24. and 123. pl. 269. 2 Cro. 74 & 75. *Horton, versus Horton.*

In our case here is no necessary implication that *Francis* must take immediately after the death of *Anne* without issue, for *Elizabeth* is still alive, and he is not to have the land till the devisor's daughters shall die without issue.

2. Had the testator set forth at length the cross remainders, this question had been out of doubt. Now he being *impers Consilii* we ought by construction to make his words answer his intent, appearing in other parts of the will, as near as may be.

As for authorities we must not expect many in case of a

Term. Mich. 33 Car. 2. B. R.

will, for the old books cannot have any unless of a devise by custom, which is rare; and every case upon a will stands upon its own legs, according to the penning thereof; yet *Mich. 32 Eliz. C. B. 4 Leon. 14. pl. 51.* is direct in the point. The case was, *A.* seised of lands had issue two sons, and devised part to his eldest in tail, and the other part to his younger in tail, with this clause in the will, *That if any of his sons died without issue, that then the whole land should remain to a stranger in fee*, and died; the sons entered into the lands devised to them respectively, and the younger died without issue, and he to whom the fee was devised entered; and adjudged that his entry was not lawful, and that the eldest son should have the land by the implicative devise.

As to the cases objected, which are, 2 *Cro. 655. Guilbert versus Witty.* A devise of three several messuages to three several children, *Provided if all my said children shall die without issue of their bodies, then all the said messuages shall*

* P. 455. * *remain to my wife and her heirs*, and two died. Resolved the wife shall have the two parts.

Resp. That differs much from this case, because there are three devises, in which case cross remainders will be more difficultly settled; for whether the survivors shall be jointenants for life with several inheritances, or tenants in common in tail, would be perhaps some question, as appears by the report of the same case, 2 *Roll. Rep. 281.* But in our case no such difficulty can arise.

Object. Pasch. 12 Jac. C. B. Johnson versus Smart, 2 Roll. Abr. 416. F. pl. 3. A devise to two for their lives, remainder to their two sons, equally to be divided and to their heirs, and each of them to be the other's heir; and if they both shall die without issue, the remainder to another; one dies, his share shall go to the remainder man.

Resp. This case cannot be law, because 'tis apparent that each of them was to be the other's heir, which is as plain a cross remainder as can be. 2. This case was received by *Roll* from some other hand, and it is reported in a private report to be quite another case; for 'twas upon evidence in a trial at bar in a case of a surrender of a copyhold, and not a devise; and *Roll* could not be a reporter at that time, for 'twas before he came to study the law. And each to be the other's heir makes a cross remainder. *Br. Devise 38. Done 44. Pet. Br. 94. b. pl. 431.*

Object. Dyer 326. a. Huntley's case, which was, that he being seised of two houses, one in *St. Michael Queenhithe*, and the other in *St. Michael Fleeth-Shambles*, which last parish was laid to the parish of *Christ Church* in *London*, and devises

Term. Mich. 33 Car. 2. B. R.

devises that house in St. *Michael Fleß-Shambles* to his wife for life, the remainder to a woman and her brother, and the heirs of their bodies, and for default of such issue, to the right heirs of the devisor; the brother dies without issue; the sister hath issue, and dies; and whether the intire house shall go to the issue, or only the moiety, and the other moiety to the heir of the devisor, was the question.

Resp. Though this question is put in the book, yet I find no argument of it; and that case will differ from this, in regard there the particular estates were not limited to the children, but to strangers, and so intrenches not upon the rule in 13 H. 7. whereby an heir is disinherited. And *Dyer* seems to intimate, that the pleading of the case was more insisted upon than this point; for he puts the stress of the case to lie upon the pleading, that the house lay in the * parish of *Christ-Church*, whereas the will says, in St. *Michael Fleß Shambles*, without averment of the union of those parishes. And 1 *And.* 21. says, the stress of the case was upon the apportionment of rent. * P. 456.

As to justice *Windham's* case, 'tis not to our purpose, because that is the case of a deed, which must be taken strongest against the grantor: here it is the case of a will, the construction whereof is to be made according to the intent of the devisor.

And so upon the whole matter, in regard the words make against the plaintiff, and the intent makes for the defendant, I conceive judgment ought to be given for the defendant.

Morgan versus Vaughan. Error in Dower at Brecknock.

THE case was, 20 Car. 2. *Vaughan* brought a writ of dower unde nihil habet in the great sessions at *Brecknock* against *Morgan*, and had judgment. And *Morgan* the tenant brings a writ of error, and assigns for error, that he was an infant at the time of the judgment given, viz. of the age of fourteen and no more, and that he appeared by attorney, whereas he ought to have appeared by guardian. And upon this infancy issue was taken, and laid to be at *Abergavenny in Com. Monmouth*, and tried at *Monmouth*, and found for the plaintiff in the writ of error.

And now *Pollexfen* moved in arrest of judgment two exceptions.

1. The writ of error was brought 26 Car. 2. and the tenant had alledged in 20 Car. 2. that he was *infra ætatem*, viz.

Estoppel.
3 Danv. Abr.
259. p. 2.
2 Jon. 170.
2 Show. 162.
Sku. 12.

Term. Mich. 33 Car. 2. B. R.

viz. fourteen and no more; and this writ of error is brought 26 Car. 2. and error assigned by attorney, and then of his own shewing he was also under age when he brought the writ of error, and assigned the error, and he is now estopped to say the contrary.

2. This infancy ought to have been tried where the land lies, which is in *Brecknockshire*, and the visne is from *Abergavenny* in *Monmouthshire*, and there is no suggestion that 'tis the next county to *Brecknockshire*.

But notwithstanding these objections judgment was reversed by the whole court.

* P. 457. * *As to the first*, Here is no estoppel, because the alledging the precise age in the *viz.* is idle and not traversable, and he might have alledged any other age, and the defendant in the writ of error could not have taken issue upon it.

Pasch. 12 Eliz. Dyer 289. b. pl. 39. The lord distrains for rent the cattle of the tenant, lessee for sixty years; who pleads that the tenant made him a lease for ten years, and prays in aid, and granted. Afterwards the bargainee of the tenant after the ten years were expired, enters, the lessee pleads his lease of sixty years: Resolved he was not estopped by pleading his lease to be but ten years in his *Aid prier*, because the lease, not the number of years, was material.

Mich. 7 E. 4. 18. Fitzh. Estoppel 69. Rescous. The plaintiff declares that *B.* held of him an house and an acre of land by ten marks, and that the plaintiff distrained, and the defendant made *Rescous*. The defendant pleads that the plaintiff at another time brought an assize against the said *B.* of the said ten marks, who pleaded *Hors. de son Fee*, and the plaintiff made title that the defendant held the house, and five acres of land and a mill by the services of ten marks, and so within his fee, and that the plaintiff was nonsuit, and after *B.* leased to the defendant for years, and demands judgment if the plaintiff shall be received to say, that the ten marks are issuing out of the house and acre only; and resolved that the plea is not good, because the quantity of the services is not material in an action of *Rescous*, but the tenure only.

Fitz. Estoppel 247. Assise by *Jane* late wife of *Richard Griffith*; the defendant pleads feoffment by deed of the plaintiff's father with warranty; the plaintiff replies *Riens passa per le fait*; the defendant rejoins, that the defendant before that time had brought an assise against the plaintiff and her late husband, who to it pleaded that the lands were given to one *W.* and *M.* his wife, and the heirs of their bodies,

Term. Mich. 33 Car. 2. B. R.

bodies, the remainder to *Jane*, the now plaintiff and her heirs, that *M.* died without issue by *W.* and that *W.* after the death of *M.* aliened in fee to the now defendant, for which *Jane* entered and demanded judgment *Si, &c.* the plaintiff there, and now the defendant replied, that the feoffment was during the life of *M.* by the deed, and the jury found accordingly; judgment if the plaintiff shall now be admitted to plead, that nothing passed by that deed: and resolved the plaintiff here was not estopped, because in the first action the deed was not in question, but the time of the feoffment, viz. whether before or after the death of *M.*

* *Fitz. Brief* 180. *H.* One shall not be estopped but of * *P.* 458. that which he may have a traverse.

As to second point, Nonage was well tried where the party was commorant, and not where the writ was brought, because collateral to the action. 1 *Bulstr.* 129. 1 *Brownl.* 150. *Ord* versus *Moreton.* *Fitz. Vifne* 63.

Sir George Fletcher's Case.

IN replevin. The defendant avows upon the statute of Deer-stealing. 13 Car. 2. cap. 10. for killing of deer, and that the plaintiff was aiding to the killing of deer in the avowant's park; the plaintiff pleads in bar, that she was not aiding, and issue thereupon, and verdict for the plaintiff. Tren. 322.

And it was moved for the avowant, that the issue is a jeo-fail, because it is an immaterial issue; for the aiding was found before a justice of peace, and shall not be tried over again: I was not at the resolution of the court but it seems plain that the statute of 32 H. 8. cap. 30. helps misjoining of issues. 3 *Cro.* 778. *Dighton* versus *Bartholomew, Goldsb.* 39. pl. 15.

Pasch. 1657. *B. B. Spathurst* versus *Overind*, error in *C. B.* debt upon a bond against *Gr. Spat.* as executor of *J. Spat.* The defendant pleads it is not his deed; the jury find it is the deed of *Spat.* as the plaintiff declared. And in error judgment affirmed, because here was an affirmative and a negative, and by the jury's finding the plaintiff had cause of action.

If the bar be good, and the replication naught, and issue be taken upon it, they shall replead to the replication, and the bar remains; and so if the bar is good, and the replication good, and the rejoinder naught, and issue taken upon it, they shall replead to the rejoinder, and the bar and replication remain: but if the bar is naught, and the replication

Term. Mich. 33 Car. 2. B. R.

replication good, and issue taken upon it, they shall replead for the whole anew, because the bar was naught. *Long 5 E. 4. 109. a.*

- * P. 459. * Jane Kingdon Administratrix of Richard Kingdon Esquire, *Plaintiff*; Richard Jones Lord Viscount Ranelagh, Sir James Hays & al', *Defendants*; *Error in C. B. Covenant.*

Error.
Skin. 6. 26.
2 Jon. 150.

THE plaintiff brought an action of covenant, and judgment was given against her in *C. B.* upon demurrer; and now she brought a writ of error in *B. R.* and the case upon the record in short is,

The plaintiff declares upon articles indented of nine parts, dated 5 Aug. 23 Car. 2 made between the said lord viscount Ranelagh of the first part, Sir Alexander Bence of the second part, Sir James Hayes of the third part, John Bence of the fourth part, Joseph Dean of the sixth part, Robert Huntington of the seventh part, John Stepney of the eighth part, and the said Richard Kingdon of the ninth part, wherein after a recital of an indenture under the great seal of England dated 4 Aug. 23 Car. 2. whereby the king granted a lease of the great branches of his revenue in Ireland to the said lord viscount Ranelagh, Sir Alexander Bence and the rest, for five years, to end 25 Decemb. 1675. The parties did all agree amongst themselves severally, that the said profits of what should accrue after all the payments to be made pursuant to the king's grant, should be divided into twelve parts, viz. four parts to the lord viscount Ranelagh, and the other eight to each of the others. And that no money should be paid out of the office (which was to be kept for issuing out of cash) but according to the indenture made by his majesty; and 150 *l.* quarterly to each share; and that the 150 *l.* should not be taken out of the cash, but should be continued there, and a note given by the receiver general of the said parties declaring the same to be advanced for the carrying on of the undertaking, at interest of 10 *l.* per cent. until all the said articles should be performed, and that the said interest should be paid quarterly. And if there should not be sufficient cash to answer the ends of the agreement, then the quarterly payment should be made use of to that purpose.

Et convent' fuit & agreat' inter omnes & singulas dictas personas Articulis prædictis, & quibuslibet eorum per & pro seipso separatim & respective & non conjunctim vel
unus

unus eorum pro altero eorum & pro separalibus & respectivis Hæredibus * Executoribus & Administratoribus suis convenit promisit concessit & agreevit ad & cum quolibet altero eorum separatim & respective & non conjunctim & ad & cum Executoribus & Administratoribus suis quod quilibet prædict. partium Articulis prædictis respective Hæredes Executors & Administratores sui & quilibet eorum secundum illorum & cujuslibet illorum dict' proportionabiles partes vel sortes de tempore in tempus & ad omnia tempora extunc imposterum bene & sufficienter salvarent servarent indem' & indemnificat. quemlibet & unumquemque al' & ejus & eorum Hæred. Execut. Administrator. & Assign. contra Regiam Majestatem Hæredes & Successores suos & omnes personas quascunque de & ab omnibus & quibuslibet Conventionibus in prærecitat. Indentura content. ex partibus dictarum partium Articulis prædict' agend. & performand. & de & ab omnibus actionibus factis & molestiis quæ in lege vel æquitate vel aliter venirent crescerent vel acciderent vel surgerent pro vel ratione cujuslibet materiæ vel rei quæ agerentur vel fierent in vel per rationem vel super computum dictæ suspensionis in prædict' recitat' Indentura mentionat. & de & ab omnibus custag. misis & demand. quibuscunque tangen. vel concernen. eadem.

Et si accideret quod aliquis vel plur. dictarum partium Articulis prædict' should happen to die before 25 Decemb. 1675. that then the share and interest of the persons so dying should devolve and be vested in the survivors according to their respective shares: and that then likewise the said surviving parties within two months after such death should well and truly pay to the executors and administrators of the party dying all and every such sum and sums of money as had been advanced by the party deceased out of the said quarterly payments of 150 *l.* per annum, together with the interest thereof which should be then due and unpaid.

That the intestate *Richard Kingdon* died before 25 Decemb. 1675. viz. 1 Decemb. 1675. and that the sum of 2850 *l.* before the said 1 Decemb. 1675. was advanced by the intestate out of the said quarterly payment of 150 *l.* and that 712 *l.* at his death was due for the interest thereof, which the defendants have not paid, but do deny to pay to the plaintiff.

The defendants plead, that by the said articles it was provided between the parties aforesaid, that it should not be lawful for the said parties, or any of them, at any time or times during the continuation of the said undertaking directly

Term. Mich. 33 Car. 2. B. R.

* P. 461. * ly or indirectly to give, grant, sell or assign his or their right, title or interest of, in or to the aforesaid indenture or any covenant, clause or agreement in the same contained, to any person or persons whatsoever, *nisi cum licentia & consensu* of any four at the least or more of the rest of the parties to the said articles, as by one part of the said articles under the seal of the said *Richard Kingdon* *hic in Cur' prolat'* appears; and that the said *Richard Kingdon* in his life-time after the making the said articles, *viz.* 27 Novemb. 27 Car. 2. *apud, &c.* with the licence and consent of the said lord viscount *Ranelagh*, Sir *James Hayes*, *John Bence*, *Joseph Dean* and *Robert Huntingdon*, five of the said parties, by a writing under his seal dated the same day and year, did assign and transfer to *Lemuel Kingdon* and *William Dawson* all his right and interest which he had by virtue of the said grant of the king; by virtue whereof all the estate and interest of the said *Richard Kingdon* in the indenture and articles aforesaid were invested in the said *Lemuel Kingdon* and *William Dawson*, so as the part, proportion and interest of the said *Richard Kingdon* to the said indenture and articles *per jus accrescendi* did not come to the defendants. *Et hoc parati sunt verificare, unde &c.* To this plea the plaintiff demurred; and judgment was given in C. B. for the defendant.

Grace Cockman *versus* William Farrer.

Error.
3 Danv. Ab.
33. p. 6. 86.
p. 8.
2 Jon. 181.
2 Show. 162.
Skin. 13.

A WRIT of error to reverse a fine levied in C. B. the writ of error was special, *viz.* that *Hugh Haworth* was seised of a messuage, 10 acres of land, and 9 acres of pasture *cum pertin'* in *Hallifax in Com. Ebor* in his demesne as of fee, and held them of Sir *Arthur Ingram* knight, as of his manor of *Hallifax* in free socage, *viz.* by fealty only; and so being seised 23 Novemb. 17 Jac. made his last will and testament in writing, and by the same did give the said tenements to *Michael Fawcett* for his life, the remainder to *Hugh Fawcett* and the heirs of his body, the remainder to the heirs of the body of the said *Michael Fawcett*, the remainder to *Michael Ward* and his heirs for ever. That the said *Hugh Haworth* died.

That the said *Michael Fawcett* entered and died, and that *Hugh* entered and became seised in tail, with the remainder over.

That the said *Hugh* levied a fine Pasch. 17 Car. 1. to *William Bradshaw* and *Thompson*, in which there was error *Ad grave*

Term. Mich. 33 Car. 2. B. R.

grave damnum Gracie Cockman Viduæ, sister and heir of
* Michael Ward deceased, eo quod the said Michael Fawcet and * P. 462.
Hugh Fawcet died both without issue.

The plaintiff assigns for error, that the said Hugh Fawcet
after the acknowledgment before commissioners, and before
the return of the writ of covenant upon which the said fine
was levied, viz. 6 April 17 Car. 1. died. It was thus:

17 Febr. 16 Car. 1. Date of the writ of covenant.

18 Febr. 16 Car. 1. Date of the *Dedimus Potestatem*.

22 Martii 16 Car. 1. The caption.

6 April 17 Car. 1. Hugh Fawcet died ante ret^r Brevis.

Pasch. 17 Car. 1. The king's silver entered; so there
was no question but that it is error. Whereupon the plain-
tiff prayed a writ of *scire facias* to the conusees, and to their
heirs, and to the tertenants of the land, who returned *scire*
feci upon Thomas Thompson one of the said cognizees, and
one William Bradshaw, cousin and heir of the said William
Bradshaw, who was dead, and also William Farrer, etq;
the defendant and others tertenants.

The defendant Farrer pleads the very fine (now endea-
voured to be reversed) and five years in bar of the writ of
error, to which the plaintiff demurred; and adjudged by
the whole court for the plaintiff, and the fine was reversed,
and the reason was, *Non potest adduci exceptio ejusdem rei cu-*
jus petitur dissolutio.

Co. Lit. 384. Tenant in tail makes a lease for life, or a
gift in tail, rendering rent, and dies, the issue brings a *for-*
medon in descender, the reversion and rent is no bar to the
action. Pasch. 7 H. 4. 40. a. pl. 4. In a writ of error to
reverse an outlawry, the same outlawry is no good plea.
And whereas it is said, Co. 2 Inst. 518. that a fine of lands
in C. B. in ancient demesne is a bar after five years, it is in-
tended another fine, and not the same which was first le-
vied; and the case is in *Terminis* 1 Andersf. 172 & 74. and
so the fine was reversed.

Term.

Wedgewood and others *versus* Bailly and others.
Trover, Staff. *Error in B. R.*

Error.

3 Danv. Ab.

32. p. 5.

Skin. 39.

2 Show. 177.

3 Mod. 249.

TROVER by five, and before verdict one of them dies, and they proceed to trial, and verdict for the plaintiffs, and then the plaintiffs suggest, that one of them is dead, and pray judgment for the rest, and had it; and the defendants bring a writ of error, and assign for error, that the party died before verdict, and so a verdict was given for a dead person. And after argument at the bar judgment was reversed, because every man shall recover according to the right which he hath at the time of the bringing the action; and therefore if the heir brings an ejectment and his ancestor dies subsequent to his action, he shall not recover. And in this case, although the plaintiffs were joint-tenants, and had a capacity of having the whole survive, yet in truth every one had but a moiety, and so were not at the time of the action intitled to so much as they are after the death of one of the plaintiffs. And as to the case of 2 *Bulst.* 262. *Spring's* case, he reports the reason of the judgment to be, because by the death of one the action survives to the other: but he mistakes the reason, as appears by *Read* and *Readman's* case. As to the cases where trespass is brought against many, and one dies, they differ much from this case, because there the trespass is joint or several at the pleasure of the plaintiff. As to the case of a replevin, 3 *Cro.* 574. though an avowant is to some purposes a plaintiff, yet he doth not bring the action, and so not within the rule, that the same right must continue which was at the bringing the action; and so judgment was agreed to be reversed by the opinion of three against *Dolben*, who desired time to consider.

Griffith

* Griffith *versus* Goodhand. Covenant. Midd. * P. 464.

THE defendant covenants that the plaintiff, his executors, administrators and assigns *valeant & possint habere* for seven years from 29 Sept. then next following the date which was 10 Julii 28 Car. 2. seven parts of all the grains made in the defendant's brew-house, and assigns one breach (*inter alia*) that the defendant with intention to deceive the plaintiff did put divers quantities of hops into the malt, of which the grains were made; by reason whereof the grains were spoiled, and became unprofitable to the plaintiff. Verdict for the plaintiff, and damages 100 l.

Condition.
2 Danv. Ab.
44. p. 12.
2 Jon. 191.
Skin. 39.

And it was moved in arrest of judgment, that this breach is out of the articles, *viz. the putting the hops into the grains*, and damages being entire, the plaintiff ought not to have judgment. But judgment was given for the plaintiff, because the intention of the parties is to be considered in all contracts; and it was the intent of the parties here, that the plaintiff should have the grains for the use of his cattle, and they will not eat them when hops are put into them. So if I covenant that I will leave all the timber which is growing on the land I hire, upon the land at the end of the term, if I cut it down, though I leave it on the land, it is a breach of my covenant. So if I covenant to deliver so many yards of cloth, and I cut it in pieces and then deliver it, it is a breach of my covenant; for the law regards the real and faithful performance of all contracts, and doth discountenance all such acts as are *in fraudem Legis*.

I grant to you an annuity till you have purchased 5 s. *per annum* rent, and you purchase 5 s. *per annum* jointly with another, that is no performance of the condition, because my intent was that you should purchase the rent for your own profit and advancement. Dyer 15. a. pl.

Watkinson *versus* Mergatron.

THE plaintiff sued the defendant in the ecclesiastical court at York, for marrying his sister's daughter, and the defendant prayed a prohibition, because out of the levitical degrees; but denied by the whole court, because it is a cause of ecclesiastical cognizance, and divines better * know how to expound the law of marriages than the * common

Prohibition.
Skin. 37.
2 Jon. 191.

* P. 465.

Term. Pasch. 34 Car. 2. B. R.

common lawyers ; and though sometimes prohibitions have been granted in causes matrimonial, yet if it were now *Res integra*, they would not be granted.

Okeden *versus* Keynel. *Ante* 391.

Recusancy.
2 Jon. 187.
2 Show. 179.

DEBT upon 23 *Eliz. cap. 1.* for not coming to church. At the trial, after the jury sworn, and before verdict given, the defendant came into the court, and did there submit, recognize, confess and acknowledge, that he had offended and done ill in not going to church, and not conforming himself to the law therein, and did then prove that he had conformed himself since the suit brought, by going to church, receiving the sacrament, and behaving himself orderly and soberly during all the time of divine service, according to the law ; and did then and there promise and engage to conform, and go to church, and there to behave himself soberly and orderly, according to the law ; and that the said defendant was never indicted or prosecuted for any offence of this nature before.

This is an action for 20*l.* a month for not coming to church, tried at the assizes in *Dorset*, and a verdict for the plaintiff for 40*l.* At the trial the defendant comes into court and conforms, and makes the above written recognition, Whether that doth discharge the action and verdict, or no, is the question ?

And the whole court did resolve that the action and verdict were discharged ; we did not argue the case publicly, but briefly gave our opinions. I had prepared my argument, but since we all agreed in opinion we did not argue.

The clauses in the several acts of parliament to be taken notice of are these, 23 *Eliz. cap. 1.* Provided always, That every person guilty of any offence against the statute (other than treason and misprision of treason) which shall before he be thereof indicted, or at his arraignment or trial before judgment submit and conform himself before the bishop of the diocese, where he shall be resident, or before the justices where he shall be indicted, arraigned or tried (having not before made like submission at any his trial, being indicted for his first like offence) shall upon his recognition of such submission in open assizes or sessions of the county, where such person shall be resident, be discharged of all and every * the said offences against this act (except treason and misprision of treason) and of all pains and forfeitures for the same.

* P. 466.

Term. Pasch. 34 Car. 2. B. R.

1 Jac. cap. 4. *Provided* nevertheless, and be it enacted by the authority of this present parliament, That if any that is or shall be a recusant shall submit or reform him or herself and become obedient to the laws and ordinances of the church of *England*, and repair to the church, and continue there during the time of divine service and sermon according to the true meaning of the statute in that behalf in the said late queen's time made and provided, that then every such person for and during such time, as he or she shall so continue in such conformity and obedience, shall from thenceforth be freed and discharged of and from any the penalties and losses which the same person might otherwise sustain and bear in respect, or by reason of such person's recusancy.

I conceive the proviso in 1 Jac. cap. 4. doth discharge the penalty notwithstanding the interest which the informer hath in the same.

1. Because the conforming was before trial.

2. Because by verdict the plaintiff acquires no debt or duty till judgment.

Mish. 37 & 38 Eliz. 1 Roll. Rep. 94. By all the justices of *England*, 1 *Roll. Rep. 94.* If *H.* be convicted of recusancy by proclamation, and afterwards he conforms himself, he shall save the penalty incurred before, because such conviction is by the words of 39 *Eliz. cap. 6.* and 3 *Jac. cap. 4.* as sufficient as if he had been tried by verdict recorded. 11 *Co. 60. Foster's case.*

Mish. 39 & 40 Eliz. 1 Roll. Rep. 94. Tenant in tail is convicted by proclamation, and dies, his heir shall not be subject to the penalty by 33 *H. 8. cap. 39.* because no debt arises thereby, because 'tis not a judgment; but if he had been convicted by verdict and judgment given thereon, he should have been charged.

Object. This will discourage prosecutors.

Resp. 'Tis no more loss to him than if the recusant had died, and the prosecutor did undertake this suit subject to the same hazard. 2. As prosecutors are not to be used hardly, so converts are to be encouraged, which made the lord chief justice *Coke* (in *Dr. Foster's case*) intercede for *Foster* to the king after judgment, 2 *Bulst. 325.* and did prevail, 1 *Roll. Rep. 95.*

Term.

Bessy *versus* Olliot & Lambert. Error. C. B.
Norff.

False Imprisonment.
2 Jon. 214.
Skin. 49.
Antea 421.

THE plaintiff declares of a trespass and false imprisonment, and detaining in prison *quousq; finem fecit ad damnum* 100*l.* The defendants justify by virtue of a writ of *Non omittas* directed to the sheriff of *Norfolk*, and a warrant to the bailiff of the duke of *Norfolk*, to whom execution of the said warrant did appertain, who committed him to the defendant as keeper of the prison of the liberty. The plaintiff replies, *De injuria sua propria, Absq; hoc*, that the bailiffs took him within the liberty. The defendant demurs, because the plaintiff traverses a thing not traversable, and answers not the defendant's bar; and judgment was given in *C. B.* for the plaintiff.

The question was this. A gaoler takes from the bailiff a prisoner arrested by him out of the bailiff's jurisdiction, Whether the gaoler be liable to an action of false imprisonment? and the judges of the common pleas did all hold that he was; and of that opinion I am for these reasons.

1. In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering; and therefore *Mich. 6 E. 4. 7. a. pl. 18. Trespass quare vi & armis clausum fregit, & herbam suam pedibus conculcando consumpsit* in six acres. The defendant pleads, that he hath an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and they *ipso invito* fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred; and adjudged for the plaintiff; for though a man doth a lawful thing, yet if any damage do thereby befall another, he shall answer for it, if he could have avoided it. As if a man lop a tree, and the boughs fall upon another *ipso invito*, yet an action lies. If a man shoot at butts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop

top the fallows * growing upon the river side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber falls on my neighbour's house and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *Aelus non facit reum nisi mens sit rea*. * P. 468.

Mich. 23 Car. 1. B. R. Stile 72. Guilbert versus Stone. Trespas for entering his close, and taking away his horse. The defendant pleads, That he for fear of his life by threats of twelve men, went into the plaintiff's house and took the horse. The plaintiff demurred; and adjudged for the plaintiff, because threats could not excuse the defendant, and make satisfaction to the plaintiff.

Hob. 134. Weaver versus Ward. Trespas of assault and battery. The defendant pleads, that he was a trained soldier in London, and he and the plaintiff were skirmishing with their company, and the defendant with his musket casually, & per infortunium & contra voluntatem suam in discharging of his gun hurt the plaintiff; and resolved no good plea. So here, though the defendant knew not of the wrongful taking of the plaintiff, yet that will not make any recompence for the wrong the plaintiff hath sustained.

2. The defendant here suffers no wrong but by his own act and will, for he was not compellable to be gaoler. And when a man takes an office, 'tis presumed he knows of all the conveniences and inconveniences which attend it. And in this, as in all other contracts, he must take the bad with the good. *Vide Moor 457. pl. 629. Coot versus Lightworth,* a stronger case.

3. As the gaols of the counties are incident to the office of the sheriff, 4 Co. 34. a. so the gaols of liberties are incident to the lord of the liberty. And the gaoler is but servant to him, as the gaoler of the county gaol is to the sheriff, and consequently they understand one another, and are privy to each other's acts relating to the prisoners, in presumption of law.

Object. By this way a subsequent sheriff may be answerable for the tort of his predecessor.

Resp. So it hath been resolved for the reason before alleged.

* 2 Cro. 379. *Wythers versus Henley.* Trespas and false imprisonment, and detaining him for a month. The defendant

defendant justifies by virtue of a *Process* out of the exchequer, directed to the defendant's predecessor, who took him by it, and also by virtue of a *Latitat*; and so the plaintiff was delivered over to the defendant. The plaintiff replies as to the exchequer *Process*, there was a *Superfedeas*, and that the predecessor detained him after the *Superfedeas* delivered; and as to the *Latitat*, that the plaintiff in that action ordered the defendant's predecessor to discharge the now plaintiff. And upon this plea the defendant demurred; and adjudged for the plaintiff, because this detaining by the now defendant is *quasi* a new taking. And the subsequent sheriff is bound to take consueance of the acts of his predecessor. And 'tis usual in other cases for one man to answer for the acts of another.

5 Co. 100. b. *Penraddock's case*. *Quod permittat* against a feoffee for a nuisance erected by his feoffor.

2 Cro. 373. *Rippon versus Bowles*, 1 Roll. Rep. 222. If I have a way over the land of J. S. who stooped it, and then let it to J. D. for years, I may have an action against the lessee, and notice is not material. 3 Cro. 918. *Prince versus Allington*.

4. The inconvenience which would otherwise fall out; for the defendant should be thus imprisoned, and have no remedy for his wrong, for the bailiff may be dead, or the arrest might be by a deputy, or person insolvent; and no inconvenience on the other side, for he may take security that he shall be charged with no prisoners, but what shall be legally committed; or perhaps he may have a special action upon the case for committing the prisoner to his custody, not having been duly arrested.

But the other three judges resolved, that the defendant the gaoler could not be charged, because he could not have notice whether the prisoner were legally arrested or not, and yet he is not compellable to take the prisoner into his custody, and if he let him go he is liable to the plaintiff in the action's suit for the escape.

Afterwards *Maynard* serjeant moved farther, that the defendant is charged by the declaration for imprisonment *quousq; finem fecit pro deliberatione habend.* which is not answered, for the imprisonment only is justified, and not the *finem fecit*; and this exception was taken *Mich. 19 H. 6. 35. a. pl. 73.* 1 Roll. Rep. 264. *Slowley versus Eveley*. But

* P. 470.

we all * thought the plea good notwithstanding that exception, because he pleads Not guilty to all *præter* the imprisonment.

July

July 18. 1682. *Upon a Commission of Review to the Court of Delegates.*

THE case was thus. *Thomas Boone* a merchant of *Ex-Devise*. *Cester* made his will, and died possessed of a personal estate of 100,000*l.* which lay in several places, and upon several securities, left three sons and five daughters, and gave his five daughters 3000*l.* a-piece; he gave his second son *Christopher Boone* 2000*l.* to be paid him at three several payments, and he gave him no more because he found him improvident. He makes *John* his eldest son his sole executor, who proves the will, and swears to bring in an inventory. A time to do it is assigned him by the judge of the prerogative court of *Canterbury*, and he not doing it, *Christopher*, June 1680. takes out *Process* and cites him before the judge of the prerogative court, who is satisfied that there needs no inventory. The will is proved *per Testes*, and 22 May 1680. sentenced to be a good will. The cause why the judge thought an inventory not necessary was, because the two first payments were made, and releases given, and then for the last by the will but 4*l.* *per centum* was due, and *John* allowed 6*l.* and also offered *Christopher* the last payment. *Christopher* not being satisfied with this, appeals to the delegates, who hear the whole cause, and sentence that there was no need of an inventory at the plaintiff's instance. And now *Christopher*, upon a commission *ad revidend.* the sentence of the delegates, prays that the sentence may be reversed, and that *John* may at his instance be compelled to bring in an inventory. His reasons alledged by his counsel were. 1. There may be found another will wherein *Christopher* may be executor, and then he will be to seek for the estate. 2. There may be specialties taken by the testator in the name of *Christopher*, and there being no trust declared, the same will be construed an advancement for *Christopher*. 3. *John* the present executor may die intestate, and then the administration *de bonis non* will belong to *Christopher*. 4. The statute of 21 H. 8. cap. 5. says, That the executor shall make a true and perfect inventory. 5. *John* hath sworn so to do, and no judge can dispense with his oath. But notwithstanding these arguments • the sentence was con- * P. 471.
firmed by *North* lord chief justice of C. B. *Wyndham* justice, and myself, and Dr. *Newton*, and Dr. *Oxinden*; and as to the three first arguments there shall not be presumed another will, specialties or dying intestate; and as to the fourth,
Ff 2 the

Term. Mich. 34 Car. 2. B. R.

the intention of the statute was for the advantage of legatees and creditors; and here the legacy is tendered, and no creditor complains; and 'tis found that *John* hath acknowledged in his hands 23000*l.* more than what will pay the debts and legacies. And by the statute the inventory is to consist only of goods, chattels, wares and merchandizes, and not of things in action; and this estate consists mostly of specialties; and it would be very disadvantageous to debtors (as this case is) to have their debts discovered when no necessity requires; and the ordinary doth frequently dispense with a longer time to bring in an inventory, and so he may dispense with the inventory upon cause; and such inventory was dispensed with in the estate of *fir Henry Martin* who died 1641. and in the case of *Vondeput* 1647. and so sentence was confirmed.

* P. 472. * Term. Mich. 34 Car. 2. B. R.

Put and Hardy *versus* Sir William Rawsterne,
Sir Thomas Beckford & al^s.

Barr.
3 Danv. Abr.
724. p. 5.
Skin. 48.
Pollexf. 634.
2 Mod. 316.
3 Mod. 1.
1 Show. 211.

TROVER of divers goods. The defendant pleads an action of trespass *Vi & armis* brought against them formerly, for taking and disposing of the same goods; and upon Not guilty pleaded, a verdict for the defendants: judgment *si actio*. The plaintiff demurs; and adjudged for the plaintiff in this action of *Trover*, because *Trover* and *Trespass* are actions sometimes of a different nature; for *Trover* will sometimes lie where *Trespass vi & armis* will not lie; as if a man hath my goods by my delivery to keep for me, and I afterwards demand them, and he refuses to deliver them, I may have an action of *Trover*, but not *Trespass vi & armis*, because here was no tortious taking; and sometimes the case may be such, that either the one or the other will lie; as where there is a tortious taking away of goods, and detaining them, the party may have either *Trover* or *Trespass*, and in such case judgment in one action is a bar in

in the other. And the rule for this purpose is, That where-
soever the same evidence will maintain both the actions,
there the recovery or judgment in one may be pleaded in
bar of the other; but otherwise not; and so this judgment
will not clash with *Ferrer's case*, 6 Co. which is good in
law; for here it is to be presumed that the plaintiffs in the
first action had mistaken their action; for that they had
brought a *Trespass vi & armis*, whereas they had no evi-
dence to prove a wrongful taking, but only a demand and
denial, and therefore the verdict passed against them in that
action, and so were forced to begin in this new action of
Trover. This judgment was given positively by *Pemberton*,
Jones and myself, *Dolben hæsitante*.

* *Hughes versus Cornelius & al'*.

* P. 473.

TROVER for a ship and its tackle and furniture. Trover.
Skin. 59.
1 Show. 143.
2 Show. 232.
Upon Not guilty pleaded a special verdict was, That
one *William Gault* a denizen of *England* was owner of the
ship at the time of the taking, and was *Dutch-built*, and
taken in the war between the *Dutch* and *French* as a *Dutch*
prize, and condemned for prize in the court of admiralty of
France, and sold, and that when the said ship was taken as
prize, there was amity between *England* and *France*. That
the master was a *Dutchman* born, but a denizen of *England*.
The mate was *English*, and eight mariners *English*, and
two *Dutch* on board; That the said ship was sold to divers
persons by virtue of the sentence of the admiralty of *France*,
and that the plaintiff bought the said ship from the persons
to whom the same was sold as aforesaid; that the defend-
ants as servants of the said *William Gault* took the said ship
from the plaintiff; and if the defendants be guilty, &c.

The chief question intended was, Whether this sentence
shall be examined by the common law? And resolved, It
shall not, because though it be in another king's dominions,
we ought to give credit to it, or else they will not give cre-
dit to the sentences of our courts of admiralty; and the
defendants are at no prejudice; for the way is, if they find
themselves aggrieved, to petition the king, who will exa-
mine the case, and if he finds cause of complaint, will send
to his ambassador residing with the prince or state where the
sentence was given, and upon failure of redress, will grant
letters of marque and reprisal; and judgment was given
for the plaintiff.

IN

Challenge.
Skin. 61, 76,
81.
2 Jon. 236.
2 Show. 218.

* P. 474.

IN a trial at the bar in an information against *Ford* lord *Grey of Warke*, and others, for taking away the lady *Henrietta Berkley*, daughter of *George* earl of *Berkley*, 20 August 34 Car. 2. The counsel for the king challenged some of the jurors who were returned out of the county of *Surrey*, and the counsel for the lord *Grey* insisted, that the cause of the challenge ought to be presently shewn, according to the statute of 33 E. 1. called an ordinance for inquests, and to enforce them to do so, the counsel for the lord *Grey* challenged *touts peravail*. But resolved by the whole court, * That the king ought by that statute to shew cause of his challenge, but not before all the jurors of the panel are called over; for if there be enough besides those which are challenged, no cause shall be shewn of that challenge; and thereupon the defendants relinquished their challenge, and the jurors find the defendants guilty. Of this opinion is *Stamford Pl. Coron. 162. b.*

December 18. About three o'clock in the afternoon, or a quarter past, died the right honourable sir *Heneage Finch*, knight and baronet, lord *Finch* baron of *Daventry*, earl of *Nottingham*, and lord high chancellor of *England*, at his house in *Great Lycen-street*.

December 20. 1682. The great seal was delivered to sir *Francis North* knight, lord chief justice of the common pleas, and he became there lord keeper thereof.

Designy's Case.

Bail.
1 Danv. Abr.
680. p. 7.
2 Shew. 221.

DESIGNY a merchant trading to *Jamaica*, spirited away the eldest son of one *Turbet*, who was a scholar at *Merchant-Taylors School*, and a hopeful youth. *Turbet* exhibited an information against *Designy*, and upon Not guilty pleaded he was found guilty at *Nisi Prius* before the chief justice *Pemberton*, the sitting after *Trinity-Term* last, and this last *Michaelmas-Term* he appeared in court, and was fined 500*l.* and to lie in prison till he paid it; since which fine imposed, the prisoner procured a promise of a pardon of his fine; but the court last term being informed of it, and it being an offence of an heinous nature, directed the father of the child to bring a *Homine Replegiando*, and thereupon an *Elongatus* was returned, and the prisoner charged with it in prison; and now *Designy* procured a letter

letter from the commissioners of the treasury, signifying his majesty's inclination of pardoning the fine, if the judges of B. R. met at the lord chief justice's chamber in *Serjeant's Inn* in *Fleet-Street*; and upon hearing counsel of both sides, we could not think it reasonable to bail the prisoner upon the *Withernam*, but did propose, that if the prisoner would bring * 1000 l. into court, we would give him his liberty, but the money to be forfeited if he produced not the child within six months, and gave him time to consider. The counsel for *Designy* produced a case 16 R. 2. *Rot.* 16. B. R. *David Degois* versus *count de Warwick*, and 5 H. 4. *Rot.* 25 B. R. *William Uscot* versus *Simon Brig*, and 12 E. 4. 4. but none of the cases reached to this case, wherein the defendant could pretend to no title to the child, because he hath been already convicted upon an information.

* P. 475.

It was objected, that if an *Elongatus est* returned by the sheriff be conclusive to the defendant, so as he may not traverse it, then the defendant hath no remedy.

It was answered, 1. The defendant may bring an action upon the case for the false return, and if it be found for the plaintiff, the defendant in the *Homine Replegiando* may be bailed.

2. If the sheriff shall die before the issue tried, or the action brought, then the king may issue out a commission to inquire of the truth of the return, which inquisition taken by virtue of the said commission may be traversed by the defendant in the *homine replegiando*; and if the issue upon that traverse be found for him, he shall be bailed. *Vide Rast. Intr.* 402. and 403. And the *capias* in *Withernam* is no execution; but unless the defendant will confess the taking, and having the party in custody, he cannot be bailed, as appears by all the cases before cited.

In the first week of *January* 1682. died Sir *Thomas Twissden*, knight and baronet, one of the justices of B. R. *Gravæus senectute*. He continued judge to his death, but was dispensed with from sitting in court by reason of his age and infirmity, and was allowed, *ut dicitur*, 500 l. per annum pension from the crown; he died in *Kent*, of which county he was; none succeeded him at his death, because justice *Dolben* was sworn at his being dispensed with, about three years ago.

ON Friday Jan. 5. 1682. In a matrimonial cause between *Emerton*, alias *Hyde*, alias *Dunblane*, contr. *Emerton*, before commissioners of delegates, and to the former

Courts.

Term. Mich. 34 Car. 2. B. R.

mer commissioners a commission of adjuncts being procured, all the judges who were therein named, and were then in town received a note subscribed by the lord president of the council, the earl of *Radnor*, the duke of *Ormond*, lord steward of the household, Sir *Leolin Jenkins* knight, principal secretary, * doctor *Hedges* and doctor *Saint John*, two doctors of the civil law, condelegates with the judges, in these words,

* P. 476.

We do appoint to meet and consult about a day for the hearing and determining this cause upon the ninth day of *January* next, in the council-chamber at *White-hall*, between the hours of nine and eleven in the forenoon of the same day, and do require the proctors on each side to attend accordingly, dated this sixteenth day of *December* 1682.

At the receipt whereof the judges were somewhat troubled, for that they heard nothing of it before, and it is to attend at *White-hall*, whereas all commissions of delegates, wherein any of the judges are named, have always been heretofore executed at one of the *Serjeants Inns*, because the judges are constantly employed in the public affairs of the kingdom, in the business in their several courts, and other things which cannot be done so conveniently for the subjects elsewhere; and also every summons upon such commissions used to be signed by one of the judges named in the commission, which was herein wanting; and thereupon six of the judges repaired together to the lord keeper *North* to inform him of the matter, and to desire his directions, who seemed to advise that we attend according to the note, but put the judges in hope that the ancient course should be observed in hearing the cause; he told the judges that the like had been attempted in *Henry Martin's* time, under pretence, that because bishops were named in the commission, the commission ought to be executed at *Doctors Commons*, but the king ordered, that the judges should not stir from their usual places of executing such commissions. This (*ut dicitur*) did now arise from the promotion of Sir *Leolin Jenkins*, who is a civilian, and would favour his profession as much as might be.

Poor.

ON *Wednesday January* 17. 1682. at *Justice-Hall* at *Old-Baily* in *London*, a case was referred to the justices, which was this; one *Fletcher* a widow, having several children by her former husband. who lived in the parish of *St. Buttolph* without *Aldgate*, which parish lies in two counties, viz. *London* and *Middlesex*, marries a second husband,

Term. Mich. 34 Car. 2. B. R.

band, and then they put out the children to nurse at *Enfield* in *Middlesex*, and then the mother dies, and after her the father-in-law; the nurse applies herself for money to the parish of *St. Buttolph*, which hath one church-warden, and several overseers of the poor of the county of *Middlesex*, and city of *London*, and the parish rates are several; the woman * lived and died in that parish which lies in *Middlesex*, who contended with the other part of the parish in *London*, and upon application to the quarter-sessions in *Middlesex*, the justices of peace there ordered that the part of the parish which was in *London* should go equal charge in relieving these children; and that part of the parish which is in *London* not satisfied with the order, applied themselves to the gaol-delivery at the *Old-Baily*, and there resolved by *Pember-ton* chief justice, *Dolben* and other justices there, that without any particular usage to the contrary, the parish in both counties ought to contribute their shares towards the relief of the children, because the statute of 43 *Eliz. cap. 2.* names only parishes; but in regard it was made appear that each part of that parish had distinct officers, and made distinct rates, and had used time out of mind to make distinct accounts to the justices of each county, the court did not look upon each division as a several parish, and thereupon ordered, that that part of the said parish which lies in *Middlesex* shall pay the nurse, and provide for the future for the said children. And it was resolved, that no notice can be here taken of the place of the birth of the children, but of their last settlement, by 43 *Eliz. cap. 2.* because they are only poor children, and not vagabonds; but they which are rogues or vagabonds within 39 *Eliz. cap. 4.* shall be provided for by the place where they were born.

At the same sessions a woman was indicted as accessory after to a burglary committed by one *Johnson* in *Leicestershire*. *Johnson* had been tried and attainted, but procured his pardon, which hath been allowed; and now the woman prayed that she might be discharged: but resolved she must plead to the indictment, for though if the principal have either his clergy, or be acquitted, or obtained his pardon before judgment, the accessory shall not be questioned; yet if the principal be attainted, the accessory must answer, though the principal be pardoned.

Term.

MEMORANDUM, the first day of this term *Edmond Saunders*, esq; of the *Middle Temple* appeared at the *Chancery-Bar*, to a writ tested in the vacation to command him to take the state and degree of a serjeant at law, and was there sworn, and immediately went from thence into the common pleas treasury, and there in the presence of all the judges, except *Levinz* who was sick, made his count, and had his coif put on, and went to the common pleas bar, and made some motions, till the lord keeper came into the court of king's-bench, and then he was sent for to the bar, and when he was there placed, the lord keeper made a very excellent speech to him, and then he came into the court, his writ for chief justice was read, and having taken the oaths of obedience and supremacy, and oath of chief justice, he was placed chief justice of the said court, in the room of *Sir Francis Pemberton*, who was the day before sworn chief justice of the common pleas at his own desire, for that it is a place (though not so honourable) yet of more ease and plenty, as the lord keeper said in his speech to *Saunders*.

Memorandum, January 25, 1682. At the importunity of one *Brumskil*, who did formerly pretend himself able to advance the revenues of the crown, the king commanded all the judges to meet and consider of his proposals, which were in the general very extravagant, and totally rejected; but upon inquiry after the management of popular actions, we did find that the party who was plaintiff would frequently get an execution to levy his part, and either left the king's part unreceived, or made some private agreement with the sheriff or defendant, or else the sheriff received it, and never accounted for it, for that it was not in charge in the exchequer, and thereupon all the judges made this rule to be observed in all their respective courts.

- * P. 479. * That all clerks of assize and associates do return the *Posseas* in all popular and penal actions and informations *quittam*, &c. *ex officio*, into the respective offices whence they issue, and to receive their fees for the returning the same at the trial from the party for whom the verdict shall be given, and

Term. Hill. 34 & 35 Car. 2. B. R.

and the master of the respective offices to whom the said *Post* teas shall be returned by the said clerks of the assise shall send a note into the exchequer to the clerk of the estreats there to the intent the sheriffs may be charged therewith.

Duncomb and Singleton *versus* Sir William Walter,
Error in C. B. Action upon the Case. Middlesex.

DUNCOMB and Singleton bring an action upon the case against Sir William Walter, executor of David Walter, esq; deceased, and set forth that the said David Walter the testator, 21 November 30 Car. 2. was indebted to John Staley in 1000*l.* for so much by the said testator of the said Staley had and received, and so being indebted promised to pay the same; and also that the said Staley for five years last past, before the said 21 November, was a goldsmith, and got his livelihood by buying and selling, and became indebted to Pigot in 200*l.* to Clayton in 600*l.* and being so indebted, the said 21 November began to conceal himself in his house with an intention to defraud his creditors, and became thereby a bankrupt within the meaning of divers acts of parliament. That 20 Febr. 31 Car. 2. at the petition of Pigot and other creditors, exhibited to the lord chancellor, a commission issued out to certain commissioners to inquire thereof, who after the death of the testator, viz. 14 May 31 Car. 2. by indenture assigned Staley's estate to the plaintiffs, by virtue whereof the plaintiffs are intitled to the said 100*l.* And the plaintiffs farther declare upon an *Indebitatus Assumpsit* for another 1000*l.* by the defendant received for the use of the testator. Upon *Non assumpsit* pleaded, the jury find a special verdict, viz. that before the plaintiffs original writ sued out, viz. 1 November 1678. and by the space of five years then last past, the said Staley was a trader, and during that time became indebted to the said Pigot in 200*l.* to Elizabeth Clark in 1000*l.* and to the said Martha Clayton in 6000*l.* The said Elizabeth Clark made her will 5 July 1677. and made John Crew, esq; her executor, and died, after whose death, and before Crew's probate of the said will, viz. 6 November 1678. the said Crew prosecuted a bill of *Middlesex* against the said John Staley and William Staley, returnable *die Jovis prox' post quindenam Sancti Martini*, for the said 1000*l.* on which day he was arrested, and put in sufficient security for his appearance, and so was delivered out of custody. That afterwards

Bankrupt.
1 Danv. Ab.
688. p. 1.
3 Lev. 57.
1 Vent. 370.
1 Skin. 22, 87.
2 Show. 253.

* P. 480.

viz.

Term. Hill. 34 & 35 Car. 2. B. R.

viz. 18 November 1678. which was before the return of the said writ, the said *John Crew* proved the said will. That the said 18 November 1678. the said *David Walter* received the said 1000 *l.* from the said *John Staley*, being before that time due to the said *David Walter* upon bond and judgment. That before the return of the said bill of *Middlesex*, *viz.* 26 Nov. 1678. the said *John Staley* voluntarily rendered himself in discharge of his bail in the suit against him by the said *John Crew*, and was then committed to the prison of the *Marshalsea* for want of bail. That the said debt due to the said *Elizabeth Clark* was a just and true debt, and the said *John Staley* being so in custody, 14 Febr. 33 Car. 2. did remain ever since his commitment, the said debt not being paid or compounded for. That the said *Staley* was, and yet is a subject of the king, born at *Westminster*. That 20 Febr. 31 Car. 2. at the petition of the said *John Pigot* on his and others behalf, a commission issued out of the chancery *prout*, and that the commissioners 14 May 31 Car. 2. assigned over the estate of *Staley* to the plaintiffs *prout*. That the said 100 *l.* mentioned by the said *David Walter* had and received, is the same mentioned in the declaration. But whether upon the whole matter the said *John Staley* was a bankrupt 18 November 30 Car. 2. *penitus ignorant & petunt advisamentum Curie*, and if he was then a bankrupt they find for the plaintiff, and if not, then for the defendant. And judgment was given in *C. B.* for the defendant; and now the plaintiff brings a writ of error, and assigns the general error.

The case in short is, *Staley* being a trader becomes indebted by bond and judgment to *David Walter* in 1000 *l.* and to *Elizabeth Clark* in 1000 *l.* and to several other persons in several other sums. 5 July 1677. *Elizabeth Clark* makes her will, and *John Crew* her sole executor and dies. 6 November 1678. *Crew* arrests *Staley* for the 1000 *l.* who immediately puts in sufficient bail. 18 November 1678. *Staley* pays *David Walter* the 1000 *l.* and then the same day renders himself to prison in discharge of his bail, and lies in prison to the time of the action, which is above two years,

* P. 481. 20 February * 1678. a commission issues 14 May following, the commissioners assign *Staley's* estate to the plaintiff; and the sole question is, whether *Staley* was a bankrupt on 6 November 1678. which was the day of his arrest; for if so, then it is for the plaintiffs, because he paid the 100 *l.* to *David Walter* after he became a bankrupt; but if he did not become a bankrupt on that day, then it is for the defendant.

The

The words of the statute of 21 Jac. cap. 19. are, *Being arrested for debt, shall after his or her arrest lie in prison two months or more upon that or any other arrest, or other detention in prison for debt. And in the said cases of arrest or lying in prison for such debt or debts, shall be adjudged a bankrupt from the time of his or her said first arrest.*

Dyosse for the defendant in the writ of error. Here is an arrest and lying in prison two months after, and so within the words of the statute.

1. *Object.* Here is not an immediate lying in prison upon the arrest, for here was bail put in.

Resp. The statute distinguishes not between the cases where bail is, and where it is not put in, and though the case may not be within the second clause, it will be within the first; for here was lying in prison two years.

2. *Object.* A man cannot be a bankrupt, but where there is a real debt due; but here *Crew* had not proved the will, and till then he could not claim the debt of the testator at the time of the arrest.

Resp. The money is due to the executor before probate, for he may release, as *Middleton's* case is, 5 Co. 28. a. And probate is only an allowance of the executorship, and an executor may before probate bring a writ, but not declare, 1 Roll. Abr. 917. A. pl. 2. And here the will was proved before the return of the writ; and where it is said an executor cannot sue before probate, it is meant he cannot sue effectually.

This statute doth not distinguish between a legal and illegal arrest; and if a bankrupt should not become so from the first time of his arrest, he might make over his estate, and then deliver himself up to prison in discharge of his bail, and so elude the statute.

Walcot serjeant for the defendant. The question is, from what time *Staley* shall be accounted a bankrupt; and I conceive only from the time that he rendered himself in discharge * of his bail, viz. 20 November 1678. A trades- * P. 482.
man's being arrested barely, makes not a bankrupt. *Et adjournatur.*

IN the case of the town of *Nottingham*, it appeared, that at a common council of the said town, it was ordered that there should be a surrender made of the charter to the king, and thereupon the mayor pursuant to the said order did take out of the town-chest the said charter, and surrendered the same accordingly; and so it fell out, that in the said charter was contained not only the franchise of the corporation,

Term. Hill. 34 & 35 Car. 2. B. R.

tion, but also the grant of certain common to the inhabitants, and because the surrender was against the minds of a great number of the inhabitants who were discontented, and were opposers of the present government of the kingdom, they took advantage of this omission, and exhibited an information into *B. R.* and desired the master of the crown-office (in whose name the information was exhibited) to file it, but in regard it was matter of state, and of great concern, he this term desired the directions of the court, who ordered that the attorney general should be made acquainted therewith, who at another day appeared, and refused to meddle therewith, and so it was left to Mr. *Astry* to file or not to file, at his discretion, for the court would not use any compulsory means for filing it, in regard they could not know whether such an information was necessary or no; and it is properly the office of the king's attorney to manage informations of such concernment.

Row *versus* Sir Thomas Clargis, Knight, for Words.
Error in C. B.

Words.

1 Danv. Ab.

86. p. 29.

3 Mod. 26.

5 Lev. 30.

Skin. 68, 88.

2 Show. 250.

THE plaintiff in C. B. declares, that he was such a day deputy-lieutenant for the county of *Middlesex*, one of the king's privy council for the realm of *Ireland*, and stood for to be chosen burghers for the parliament at *Christ-Church* in *Com. Hants*, and that the defendant spake these words of him, *viz. He is a Papist*. Upon Not guilty pleaded, verdict for the plaintiff, and judgment; and now *Clargis* brought a writ of error, and judgment affirmed by all the four justices, *viz. Saunders, Jones, Dolbin* and myself, and resolved,

- * P. 483. 1. That the words taken abstractively are actionable, * because the acts of parliament of 23 *Eliz.* 3 *Jac.* and 25 *Car.* 2. do expose a papist to several penalties and incapacities. 2. *A fortiori*, as the words have relation to the quality of the person, for a deputy lieutenant is an officer of great trust; and though 'twas objected, that 'tis not an office of profit, and so no prejudice to lose it: It was answered, That 'tis of as much profit as a justice of peace; and yet the words spoke of a justice were adjudged actionable; and the times alter the law when the sense of words alter; for though formerly (*papist*) was not actionable, yet now 'tis grown to be a word of more reproach. So healer of felons was not actionable till it appeared to be a concealer of felons: and to say of an attorney he is a knave, is actionable, though antiently *knave* was no more but servant. It was objected farther,

Term. Hill. 34 & 35 Car. 2. B. R.

farther, that to have the word *papist* to bear an action would be a means to discourage prosecution of papists. To which it was answered, That railing is no prosecution; and we must not punish the innocent, because we cannot exceed in our expressions of the nocent.

And the law doth alter with the time; for before 21 E. 3. 23. an infant could not bring an appeal; and we find no precedent before that time of an appeal so brought, but now 'tis frequent; and judgment was affirmed.

Roskelley *versus* Rebecca Godolphin.

Mich. 34 Car. 2. Rot. 599. B. R.

DEBT upon an obligation dated 24 July 18 Car. 2. Executor. against the defendant, administratrix of *John Godolphin*, *durante minori etate* of *Rebecca* his daughter, for 1681. 3 Danv. Abr. 386. p. 7. 2 Show. 403. Skin 214. The defendant pleads, That the testator became bound by obligation, dated 18 May 26 Car. 2. in 6000*l.* to *Brook* and *Wallis* (trustees of *Rebecca* the defendant, upon her marriage with the said *John Godolphin*) upon condition to pay to the defendant herself 3000*l.* within fourteen days after the death of the said *John*, if she should survive him, and says that she survived him, and that she hath not assets *ultra* 1000*l.* which she retains towards satisfaction of the said 3000*l.* The plaintiff demurs generally, and I conceive judgment ought to be given for the defendant, and that it is a good plea.

* 1. I do agree, that if *John Godolphin* had made a stranger executor, there must have been an actual payment, or judgment upon the bond before this action brought, or else *pleinment administre* had not been a good plea. * P. 484.

2. If the payment here had been to be made to *Brook* and *Wallis*, though in trust for the same, retainer could not have been pleaded, though the law seems contrary, 3 Cro. 754. *Huish versus Philips*, where a bond was to *A.* to the use of *B.* conditioned to pay *B.* money, 'twas a good plea, that the obligor tendered the money to *B.* because he was in a manner privy to the obligation, and so is *Co. Lit.* 209. a.

3. But here though the bond be to *Brook* and *Wallis*, yet the condition is that the executors of *John Godolphin* shall pay to the wife herself the money, and she is administratrix herself; now she cannot pay to herself, and therefore the payment must be by way of retainer.

Object.

Term. Hill. 34 & 35 Car. 2. B. R.

Object. She is but administratrix *durante minori etate* of Rebecca, so we cannot retain.

Resp. She may sell goods for payment of debts, 5 Co. 29. Prince's case, & *eadem ratione* she may retain to pay herself, Hob. 250. Bryars *versus* Goddard, administrator *durante minori etate* may retain.

Dominus Rex *versus* Higgins & al'. Trial at Bar.
Worcester.

Challenge.
1 Vent. 366.
Skin. 91, 101,
105.

AN information in nature of a *Quo Warranto* exhibited against certain persons being citizens of the city of Worcester for using several liberties and franchises within the said city, setting forth, that king James 2 October 19 Jac. did incorporate the said city of Worcester by the name of mayor, aldermen and citizens of the city of Worcester. That there should be a mayor, six aldermen, one sheriff, two chamberlains, twenty-four (of which the mayor and aldermen should be seven) to be capital citizens and counsellors, and forty-eight capital citizens, whereof the chamberlains should be two, and that the twenty-four and forty-eight should be called the common council, and that the aldermen should be elected out of the twenty-four. That upon the death or removal of any of the twenty-four, their place should be supplied out of the forty-eight. That the defendants and several others named in the information 1 November 32 Car. 2. * to the day of exhibiting the information, without any authority did claim to be mayor, aldermen, sheriff and citizens of the number of twenty-four and forty-eight, and by all that time did usurp upon the king, &c.

Higgins pleads, that *die Lunæ post Festum Sancti Bartholomæi Anno 32 Car. 2.* he was chosen mayor, and the second Monday after Michaelmas took his oath for execution of his office *prout* letters patent require, and so justifies, &c. The king's attorney general replies, That when elected mayor he was not of the twenty-four, and thereupon takes issue.

Edward Cooksey another of the defendants pleads, That he 9 July 13 Car. 2. by the commissioners upon the act of corporations was made one of the twenty-four; and that on Monday post Festum Sancti Bartholomæi 32 Car. 2. he was elected alderman and sworn, &c. The attorney general replies, That when the defendant was elected alderman he was not of the twenty-four; and issue thereupon.

Edmund Osdnal another defendant pleads, That he being one of the forty-eight, was 16 Jan. 1663 chosen of the twenty-

twenty-four. The attorney general replies, That when elected of the twenty-four he was not of the forty-eight; and issue thereupon.

John Millington, William Hughes and others plead, That 29 March 1677, &c. they were chosen of the forty-eight. The attorney general replies, That when they took the oaths to execute the office of one of the forty-eight, they did not subscribe the declaration *prou* the act of parliament requires. The defendants rejoin, that they did subscribe; and issue thereupon; and a trial at the bar upon all these issues.

The counsel for the defendants took a challenge to the array, because the jury was out of the city of *Worcester*; and it being suggested by the attorney general upon the roll, that the sheriff of the said city was one of the defendants, he prayed a *Venire facias* to the coroners, and that there were two coroners, and though both the said coroners were mentioned upon the record to have returned the panel, yet that in truth, but one only, *viz. Trimnel*, did return the same, and so not good; but the court unanimously resolved, that the challenge ought not to be allowed, because it appears by the record itself, that both did return the same; and that no challenge contrary to the record ought to be allowed.

Another challenge was taken to the polls, because the jurors had not any freehold within the city; and this challenge was debated by all the four judges, and it seemed to them all, that it can be no good challenge, because the statute of 2 H. 5. cap. 3. doth not extend to this case, for that is only in causes between party and party; nor doth 35 H. 8. cap. 6. reach thereto, because that statute cannot extend to cities and corporations, but to sheriffs of counties at large; for if a panel made in corporations, must have freehold jurors, they must have likewise six hundredors, which cannot be in any corporation of *England*; and so 27 Eliz. cap. 6. But the jurors of corporations are to be at the common law; and though it is said 3 Cro. 413. in *Blunt's* case, that there ought to be some freeholders, that cannot be intended in corporations, for in some corporations there are no freeholders at all, and so justice would fail; and by constant practice in all the trials at *Guildhall, London*, by *Nisi prius*, no such challenge was ever made or allowed, and therefore it would be very mischievous after so long practice to the contrary to admit this challenge; and yet nevertheless, because the counsel for the defendants were not well satisfied with this resolution, I was desired by the other

Term. Hill. 34 & 35 Car. 2. B. R.

judges of the court to know the opinion of the judges of the court of common pleas, and I discoursed with them, and propounded the challenge to them; and *Pemberton* chief justice, *Wyndham* and *Charleton* (*Levinz* being absent *propter agritudinem*) did clearly concur with us, and I returned their answer so to the court; and for not allowing these two challenges, the defendants counsel preferred a bill of exceptions, which they desired might be signed by us, that they might be afterwards enabled to alledge the same for error in parliament, if occasion should be.

Vide 17 Aff. 15. In an inquest in an action of debt it was not allowed for a challenge, that the jurors had not sufficient land, because the freehold was not in demand.

Note; In the case of sir *Henry Vane* it was resolved 14 Car. 2. B. R. That a bill of exception doth not extend where prisoners are indicted at the suit of the king. *Sydenham Rep. 85.*

* P. 487.

* *Hitchins versus Stevens.*

Attornment.
1 Danv. Abr.
610. p. 10.
2 Jon. 217,
232.
2 Show. 233.

DEBT for rent. The plaintiff sets forth, that *A.* was possessed of the lands for the term of ninety-nine years by the demise of *B.* and afterwards *A.* demised the premises for twenty-one years to the defendant, who entered and was possessed, and afterwards granted the reversion to the plaintiff, and that so much was in arrear, *unde actio accrevit.* Upon *Nihil debet* pleaded, and verdict for the plaintiff, it was moved in arrest of judgment, that the plaintiff had not alledged in his declaration, that the defendant did ever attorn to the plaintiff's grant of the reversion. And resolved good enough without it after a verdict, 2 *Roll. Rep. 489.* for 'tis apparent, that if the plaintiff had not given the attornment in evidence, he must have been nonsuited; and wheresoever it may be presumed that any thing must of necessity be given in evidence, the want of mentioning of it in the record will not vitiate it after a verdict; and so judgment was given for the plaintiff.

The King *against* The Inhabitants of Bitton. Glouc.

Fences.
2 Show. 255.

RESOLVED by *Saunders* chief justice, That cutting down of timber-trees by unknown persons *noctanter*, is not within the statute of *Westm. 2. cap. 46.* for the words of the statute are, *Fossatum & sepem prostraver*.

Smith

Smith *versus* Batterton.

TRESPASS *quare vi & armis* the defendant flung down ^{Costs.}
 certain stalls of the plaintiff in the market-place of ^{2 Danv. Ab.}
Highworth in *Com. Wilts.* Upon Not guilty pleaded, ver- ^{222. p. 13.}
 dict was found for the plaintiff, but damages were given un- ^{2 Jon. 232.}
 der 40s. and upon the secondary's refusing to tax costs, as ^{Skin. 100.}
 being a case within 22 & 23 Car. 2. cap. 5. pl. 236. it was ^{2 Show. 258.}
 moved by the plaintiff's counsel that costs might be taxed;
 and upon debate it was resolved by the whole court, that
 the plaintiff shall have his ordinary costs, because the statute
 shall be intended to reach only to such actions in which the
 * freehold may apparently come in debate; but in this case * P. 488.
 the action is not *Quare clausum fregit*, but only for destroy-
 ing a chattel, and the freehold cannot come in debate, any
 more than if a man shall take his sword out and run a
 coach-horse into the guts, whereby he died, and the owner
 shall bring an action *Vi & armis* for it, and recover under
 40s. damages, yet he shall have his full costs.

Sands *versus* Exton.

The whole Proceedings of this Case are as follow.

CAROLUS Secundus Dei Gratia, &c. Universis & sin- ^{Prohibition.}
 gulis Vice-Admirallis Justiciariis ad pacem Majoribus ^{Skin. 91.}
 Vicecomitibus Ballivis Marefchallis Constabulariis cæterisque ^{2 Show. 300.}
 Officiariis & Ministris nostris tam infra Libertates & Fran-
 chesias nostras quam extra ubilibet constitutis & præsertim
 Willielmo Jones Gener. supremæ Cur. Admiralitatis nostræ
 Angliæ Mariscall. ejusque Deputato salutem. Cum dilectus
 noster Richardus Lloyd Miles Legum Doctor Surrogatus
 dilecti nostri Leolini Jenkins Militis Legum etiam Doctoris
 in Suprema Curia nostra Admiralitatis Angliæ præd. locum
 tenen. Commissariiique Generalis ac Curæ præd. Judicis &
 Presidentis legitime constituti rite & legitime proceden. ad
 petitionem dilectorum nostrorum Thomæ Exton Militis
 Legum Doctoris Advocati nostri Generalis & Samuelis
 Franklin Arm. Procuratoris nostri Generalis præsentat dicto
 Domino quendam Ordinem sive rescriptum quoddam per nos
 fact. tenoris sequen. viz.

Term. Hill. 34 & 35 Car. 2. B. R.

* P. 489. * *At the Court at Whitehall, Dec. 13, 1682.*

P R E S E N T

The King's Most Excellent Majesty.

Lord Archbp. of Canterbury.	Earl of Craven.
Lord President.	Earl of Conway.
Lord Privy Seal.	Earl of Rochester.
Duke of Albemarle.	Lord Viscount Fauconberg.
Duke of Ormond.	Lord Finch.
Duke of Beaufort.	Lord Bishop of London.
Lord Chamberlain.	Lord Chief Justice North.
Earl of Chesterfield.	Mr. Secretary Jenkins.
Earl of Sunderland.	Mr. Chancellor of the
Earl of Clarendon.	Exchequer.
Earl of Bath.	Mr. Godolphin.

WHEREAS the governor and company of merchants of London, trading to the *East-Indies*, did represent to his majesty in council, that the ship *Expectation*, alias *Commerce of London*, was at *Graves-End* bound for the *East-Indies* to trade within the limits of the said company's charter; his majesty having taken into consideration that the *East-India* company have several contracts, treaties and articles of peace with several princes in the *East-Indies*, and that in case such are permitted to trade who have no such leagues or treaties with the said princes, acts of hostility may ensue, and the trade of the nation much prejudiced, was pleased to order the right honourable the commissioners of the admiralty to cause the said ship to be stopped until she shall be cleared, or that the owners shall give security in the court of admiralty, where his majesty hath directed a prosecution of the said ship.

It is this day ordered by his majesty in council, That his majesty's advocate general and proctor do take care forthwith that process be issued against the said ship *Expectation*, alias *Commerce*, for staying of her until security be entered in the court of admiralty, that she shall not go nor trade with any infidel country within the limits of the *East India* company's charter without his majesty's licence.

Francis Guyn.

Et

* Et allegan. dictam navem sine autoritate vel mandato * P. 490.
nostro propediem est vela datur. ad partes Indiæ Orientalis ad
ibidem mercaturam exercend. infra limites Diplomatis sive
Chartæ (Anglicè *the charter*) Societatis Mercatorum de Lon-
don. negotian. ad Indias Orientales ejusdem Mercatoribus
autoritate nr'a concess. in præjudicium dicti Diplomatis &
contra intentionem ejusdem & præjudicium mercaturæ Na-
tionis nostræ Angliæ prout ex Rescripto nostro plenius appa-
ret & peten. Warrantum decerni contra dictam navem ejusque
apparatus & access. eandemq; navem ejusque &c. vigore
ejusdem arrestand. & sub securo custodiend. arresto donec &
quousque cautum fuerit in suprema Curia nostra Admiralita-
tis præd. interposit' ut dicta navis non procedat nec merca-
turam exerceat in aliquibus Regionibus sive Ditionibus ali-
quorum Principum & populorum Infidelium Christianæ
Religionis advers. infra limites dicti Diplomatis sive Chartæ
dictæ Societatis Mercatorum de London. negotian. ad Indias
Orientales existentium absque licentia sive autoritate nostra
in ea parte prius obtenta juxta Rescriptum sive Ordinem
nostrum prædict. decreverit dictam navem *the Expectation*,
alias *the Commerce of London*, arrestand. fore & sub salvo &
securo custodiend. arresto prout per Advocatum & Procura-
torem nostrum General. præd. petitur Vobis igitur conjunctim
& divisim committimus & firmiter injungendo mandamus
strictèque præcipimus quatenus non omittatis propter ali-
quam Libertatem vel Franchis. quin realit' arrestetis seu
arrestari faciatis peremptorie dictam navem *the Expectation*,
alias *the Commerce of London*, ejusque apparatus & access.
ubique eadem invenietis eandemque sic capt. & arrestat.
sub salvo & securo custodiatis arresto donec & quosque cau-
tio fuerit interposita in Suprema Curia nostra Admiralitatis
præd. ut dicta navis non procedat nec mercaturam exerceat
in aliquibus Regionibus sive Ditionibus aliquorum Principum
& Populorum Infidelium Christianæ Religionis advers. infra
limites dicti Diplomatis sive Chartæ dictæ Societatis Merca-
torum de London. negotian. ad Indias Orientales existen-
absque licentia sive autoritate nostra in ea parte prius ob-
tent. juxta Rescriptum nostrum sive Ordinem prædict. Et
hoc nullatenus omittatis Dat. Londini in Suprema Curia
nostra Admiralitatis præd. Sigillo ejusdem magno decimo
tertio die Decembris 1682. Regnique nostri tricesimo quarto.
Orlando Gee Registerius. Concordat cum Registro Ita
testor Ed. Parre Notarius publicus.

Die

- * P. 491. * Die Martis 19 Decemb. 1682. inter horas quartam & sextam post Meridiem ejusdem diei coram venerabili & egregio Viro Domino Richardo Lloyd Milite Legum Doctore Surrogato honorandi viri Domini Leolini Jenkins Militis Legum etiam Doctoris in Suprema Curia Admiralitatis Angliæ locum tenentis Generalis & Commissarii dictæque Cur. Judicis & Præsidentis legitime constituti in Cœnaculo infra Hospitium D'norum Advocatorum London. præsent. Edwardo Parre Notario publico, &c.

Serenissimus Dominus noster Rex contr. Navem quand vocat. *the Expectation*, alias *Commerce of London*.

WHICH day the right worshipful Sir *Thomas Exton* the king's advocate, and *Samuel Francklin*, etq; his majesty's proctor, did on the behalf of our sovereign lord the king propose that if captain *Sands*, or any of the parties, having any interest in the said ship and lading will give security into this court in the sum of 40,000 *l.* that the said ship shall not go nor trade with any infidel country within the limits of the *East-India* company's charter without his majesty's licence, pursuant to any order of the king and council lately presented to this court bearing date the 13th of this present month of *December*, or otherwise will take out a commission of appraisement to appraise the said ship and the goods laden on board her, and give in bail in the double value of the said ship and goods according to the said appraisement, in case they will not unlade the said goods, or if they will take their goods out of the said ship (which the king's advocate and proctor offered them to do if they should think fit) then in the double value only of the said ship, and of her tackle, apparel and furniture, that in such case the said ship may be decreed to be released from the arrest she now lies under, otherwise they prayed that she may still be continued under the said arrest until such bail be given as aforesaid in the presence of the said captain *Sands* and Mr. *Chapman*, his proctor, dissenting and alledging, offering and praying as in the former act of this court is contained,

Whereupon the judges declared and offered, that any of the persons concerned in the said goods and lading may unlade and take their goods out of the said ship, if they please, and that, if they will so take them out, he will require bail

- * P. 492. in * no greater sum than in the double value of the said ship, and

and of her tackle, apparel and furniture, according to the appraisement to be made as aforesaid; and farther declared that if captain *Sands* and the persons chiefly concerned with him in this business will affirm upon oath, that they did not design or intend to go or trade, nor will go or trade with the said ship in any infidel country within the limits of the *East-India* company's charter without his majesty's licence, that then he will take their juratory caution, and will decree the said ship to be released from the said arrest without requiring any other or further caution or security; which they refusing, and also refusing to give in bail as aforesaid, the judge decreed that the said ship with her tackle, apparel and furniture should still continue under the arrest of this court until such bail be given as above required. *Concordat cum Originali quod attestor Tho. Bedford publ. dictæ Curia Registarii Deputatus.*

Upon these proceedings *Sands* moves for a prohibition upon the suggestion ensuing, *viz.*

Anglia, ff. Memorand. quod die Martis prox. post Oclavas Sancti Hillarii isto eodem Termino coram Domino Rege apud Westm. Ven. Thomas Sands Magister cujusdam Navis, vocat. *the expectation*, alias *commerce of London*. Et dat Cur. Domini Regis nunc hic intelligi & informari quod in Statuto in Parlamento D'ni Richardi nuper Regis Angliæ Secundi post Conquestum apud Westm. in Com. Midd. Anno Regni sui decimo tertio tent. inter alia inactat. existit quod Admiralli & eor. deputat. de aliqua re infra Regnum Angliæ nisi solummodo de re super mare prout tempore Domini Edwardi nuper Regis Angliæ Progenitor. dicti Domini Regis Richardi Secundi debite usum fuit nullatenus intro-mittent Quodq; in Statuto in Parlamento dicti Domini Regis Richardi Secundi post Conquestum apud Westm. Anno Regni sui decimo quinto tent. (inter alia) declarat. ordinat. & stabilit. existit quod de omnibus contractibus placitis & querelis ac de omnibus rebus quibuscunque fact. seu emergen. infra corpus Com. tam per terram quam per aquam Ac etiam de Wrec. Maris Cur. Admiralitatis nullam habeant Cognitionem Potestatem Jurisdiction. sed quod omnia hujusmodi contract. placita & querelæ ac omnia al' emergen. infra corpus Com. tam per terram quam per aquam (ut supradictum est) necnon Wrec. Maris forent triat. terminat. discuss. & remediat. per leges terræ & non * coram Admi- * P. 493.
rallo nec per Admirallum nec ejus locum tenen' quovismodo prout

prout per eundem Actum inter alia plenius liquet & apparet Cumque omnia & singula placita & cognition' placitor' & triation' validat' in lege aliquarum Literarum Patentium Domini Regis nunc vel Progenitor' suorum sub magno sigillo suo Angliæ confect' ac Statutorum hujus Regni Angliæ interpretation' construction' & exposition' ac cognition' triation' punition' & determination' omnium transgres. criminum & malefic' & offensar' & al' rerum quarumcunque super terram & non sup' altum mare fact. commis. emergen' seu perpetrat' ad Dominum Regem nunc & Coronam suam Regiam specialit' spectent & pertineant Ac per legem terræ hujus Regni Angliæ coram ipso Rege vel Justiciariis suis aut al' Judicibus temporalibus in Cur' Regis & non coram Admirallo ne per Admirallum vel ejus Deputat. sive locum tenen' quovismodo triari terminari & discuti debeant & semper hætenus consuever.'

Quodque idem Thomas Sands 1 Dec. nunc ult. præterit. & diu antea super terram & intra corpus Com' scilicet apud London' præd. in Paroch. beatæ Mariæ de Arcubus in Warda de Cheap possessionat. fuit de prædict. Nave, vocat. *the Expectation* alias *Commerce*, cum apparat. & acceßion' adinde spectan' & pertinen' ut de bonis & catallis suis propr' Et sic inde possessionat. existen' idem T. Sands Navem ill' adtunc & ibidem præparavit & aptavit pro quodam Voiagio mercatorio a portu de London ad Insulam de Maderas & separalia alia loco in partibus transmarin' cum eadem Nave fiend. ac adtunc & ibidem præparavit & aptavit pro quodam Voiagio mercatorio a portu de London ad Insulam de Maderas & separalia alia loco in partibus transmarin' cum eadem Nave fiend. ac adtunc & ibidem scilicet apud London' præd. in Paroch. & Ward. præd. diversa bona & catalla mercimon' & merchandisas ad valenc' 10000 l. & amplius abinde in partibus transmarinis merchandizandi causa transportand. in eadem Nave oneravit pro salario commodo & proficuo ipsius T. Sands inde fiend. ac cum eadem Nave post finem voiagii illius in Angliaredeund' Gubernator tamen & Societas Mercator' de London' ad Indos Orientales negotian' necnon Thomas Exton Miles Samuel' Franklin Armig' Willielmus Joyner and Johannes Leech præmissorum non ignari sed machinan' ipsum Thomam Sands contra debitam legis terræ hujus Regni Angliæ formam & effectum Statutorum in hujusmodi casu nuper edit. & provis. indebite prægravare opprimere & fatigare & prohibere & retarde Navem prædict. a Voiagio suo prædict. prosequend. Ac ipsum Thomam Sands de proficuo & advantage Voiagii illius impedire

impedire & deprivare necnon dictum Dominum Regem & Coronam suam Regiam exhereditare cognitionemque placiti * prædicti quæ ad dictum Dominum Regem nunc & Coronam suam Regiam specialit. spectat & pertinet ad aliud examen in Cur. Admiralitat. trahere ipsi iidem Gubernator & Societas prædict. & Tho. Exton Sam^r Franklin Willielmus Joyner & * P. 494.

Leech postea scilicet 13 Decemb. anno Regni dicti Dⁿⁱ Regis tricesimo quarto apud Paroch. beatæ Mariæ de Arcub. in Ward de Cheap London. causer. & procuraver. ipsum præd. T. Sands & Navem præd. secutari & prosequi in alta Cur. Admiralitas Angliæ Judicis tent. de eo quod ipse idem Th. Sands cum Nave præd. fuit designat. in quodam Voiagio & navigare intendebat in partes transmarinas viz. ad Indos Orientales ibidem merchandizare & mercaturam exercend. quibusdam locis portubus Regionibus & Dominiis in quibus sola merchandizatio & negotiatio, Anglic *Trading*, per Literas Patentes Domini Regis nunc sub magno sigillo suo Angliæ præd. Gubernator. ac Societat. concess. fuit prout in Cur. Admiralitatis præd. allegat. & prætenf. fuit Ac superinde & sup^r allegation. & prætenfion. ill. in Cur. ill. fact. prætext. cujusdam Warranti e præd. suprema Cur. Admiralitatis Angliæ emanan. ipsi iidem Gubernator & Societas Tho. Exton Samuel Franklin Willielmus Joyner &

Leech die & anno ult. præd. Navem præd. ceper. & arrestaver. & capi & arrestari causaver. & procuraver. super tert. & infra corpus Com. scilicet apud London. in Parochia & Ward. præd. Ac eandem Navem cum eisdem bonis & catallis in eadem adtunc & adhuc ibidem onerat. ut præfertur sub arresto præd. ex causa præd. continue abinde hucusque detinuer. & adhuc detinent ipsumque Tho. Sands in præd. Cur. Admiralitatis Angliæ coram præd. Richardo Lloyd Mil. Legum Doctore Surrogato Leolini Jenkins Militis dictæ Cur. Admiralitatis Angliæ Judicis comparere de et super præmissis respondere minus iuste astringere Ubi revera et de facto idem Th. Sands tempore caption. et arrestation. Navis præd. et diu antea fuit Magister ejusdem Navis et eadem Nave præparat. aptat. et onerat. fuit cum bonis et catallis præd. pro Voiagio præd. super terram infra Corpus Com. scilicet apud London. præd. in Paroch. et Ward. præd. et non infra Jurisdiction. Cur. Admiralitatis præd. Ac ubi revera et de facto prætenf. causa pro caption. et arrestation. Navis præd. accrevit super terram et non super alto mari nec infra Jurisdiction^r Cur^r Admiralitatis scilicet apud London^r præd. in Parochia et Ward. præd. Ac ubi revera prædict. Judex Cur. Admiralitatis nunquam habuit potestatem sive authoritatem tenend. placit. præd. nec audiend.

et

* P. 495. et terminand. * causam præd. Ac ubi revera et de facto præd. pretens. Literæ Patentes Domini Regis nunc fact. et concess. et sigillat. fuer' super terram scilicet apud London præd. in Paroch. et Ward. præd. Ac licet idem Th. Sands omnia et singula præmissa præd. per ipsum superius in hac parte suggest. et allegat. in prædict. Cur' Admiralitatis coram præfat. Iudice Cur' illius in ipsius Th. Sands et Navis præd. exoneration. et dismissal in præmissis in eadem Cur. Admiralitat. coram præfat. Iudice sæpius placitavit et allegavit et ill. testimonio et veritate inevitabili probare obtulit Idem tamen Iudex Cur' Admiralitatis clamans et prætendens cognition. causæ et materiæ præd. sibi de jure spectare et pertinere placitum allegation. et probabation. ill. admittere seu recipere ac Navem præd. amittere et exonere penitus recusavit ac ad instance. et promotion. præd. Gubernator' et Societatis Tho. Exton Sam. Franklin Willielmus Joyner et

Leech per quandam sententiam suam in ea parte habit. et fact. decrev' et ordinav' quod navis præd. continueret sub arresto præd. quousque cautio al. ball. ad valenc. 40000 l. imponeretur pro nave præd. in præd. Cur. Admiralitatis quod navis præd. non procederet nec mercatur. exerceret ad aliquem locum Regionem seu Ditionem infra limites per prædictas Literas Patentes eisdem Gubernator. et Societat. concess. contra formam earundem Literarum Paten. in dicti Domini Regis nunc et legum suarum contemptum et in retardation. Voiagii præd. & ipsius Th. Sands ad grave præjudiciu. et depauperation. manifest. ac contra formam et effectum Statut. in hujusmodi casu edit. et provis. Et hoc parat: est verificare unde idem Th. Sands auxilium Cur. dicti Domini Regis nunc hic humillime implorando petit sibi remedium festinum et breve dicti Domini Regis nunc hic de prohibitione præfat. Iudici Cur. Admiralitatis ac al. Iudici in hac parte compet. cuicunque Ac etiam præd. Gubernator. et Societati Mercatorum London. ad Indos Orientales negotiation. procuratoribus factoribus et agentibus sui quibuscunque Necnon præd. Tho. Exton Sam. Francklin Will Joyner

Leech et omnibus aliis Officiariis et Ministris ejusdem Cur. Admiralitatis in hac parte dirigend ad perhibend ipsis & eorum cuilibet ne ipsi vel eorum quilibet placitum præd. præmissa præd. quovismodo tangen. coram ipsis vel eorum aliquo ulterius teneant nec eorum aliquis teneat Et ne præd. Gubernator et Societas Factores Procuratores et Agentes sui necnon præd. Th. Exton Sam Francklin Willielmus Joyner &

Leech quovismodo in placito præd. premissa præd. quovismodo concernen. versus ipsum Tho. Sands vel navem

navi
nec
præ
vel
visu
illi
goti
app
omn
seu
præ
ciav
seu
eisd
relat
Voia

M
Sir
super
And
Fran
and
the a
justic
Regi

T
justic

R
nor
plain
The
ter o
to ha
act o
tates
praye
attac

Term. Hill. 34 & 35 Car. 2. B. R.

navem præd. in præd. Cur. Admiralitatis ulterius procedant necnon eorum aliquis procedat * quod in ipsius Th. Sands * P. 496. præjudicium vel navis præd. in Voiagio præd. retardation. vel læsion. Cõron. dicti Domini Regis procedere valeat quovismodo Et si quicquam in contrarium præmissor' facti. sit illi eidem Th. Sands emendari facerent nec quicquam in negotio præd. versus ipsum Th. Sands vel navem præd. ejusve apparat. sive accession. attemptet seu attemptent sed quod omnia decreta seu sententiæ si quæ versus ipsum Th. Sands seu navem præd. seu bona in eadem existen. de et super præmissis occasione præmissorum fulminaverit seu pronuntiaverit sine dilatione relevari adnullari et frustrari causaret seu causarent et ipsum Th. Sands et navem præd. cum eisdem bonis et catallis ab arresto et restriction. præd. relaxaret et penitus absolveret Ita quod idem Th. Sands in Voiagio illo procedere valeat si voluerit Et ei concedit. &c.

Memorandum, on Thursday April 20, 1683. 35 Car. 2. Sir William Dolben one of the justices of B. R. received a supersedeas to his commission of being judge of this court. And April 25. 1683. being the first day of Easter term Sir Francis Withens knight, council extraordinary to the king, and of the Middle Temple was sworn serjeant at law, and in the afternoon at the lord keeper's house sworn one of the justices of B. R. He gave rings, Cujus Inscriptio, Lex placuit Regi.

The ensuing case and argument I had from the lord chief justice North, May 25. 1681.

Carter versus Crawley. In Prohibition.

ROBERT HAMOND died intestate leaving neither Distribution. wife nor child, father nor mother, brother nor sister, nor uncle. The administration was granted to Agnes, the plaintiff's wife, the surviving sister of the intestate's father. The defendants are the children of Margaret the other sister of the intestate's father, who sue in the Spiritual Court to have a proportion upon distribution according to the late act of 22 & 23 Car. 2 cap. 20. for settling of intestates estates, and the judge did award distribution; whereupon they prayed a prohibition. And the defendants appearing to an attachment upon the prohibition, and denying the contempt, set

set forth this matter in a plea to have a consultation; whereupon the plaintiff demurs.

- * P. 497. * The question is single, the intestate having neither wife nor child, nor father nor mother, but his next of kin being two aunts, one whereof was dead in his life-time, and the other having administration, whether the children of the deceased aunt shall be admitted *Jure representationis in loco parentis* to demand a share upon distribution, as their mother should have had if living.

It depends upon the exposition of the act for settling intestates estates, and is of great consequence; for whatever is determined by the common law to be the true meaning of this act must be a rule to the ecclesiastical courts, for the courts of common law are entrusted with the exposition of acts of parliament, and we ought not to suffer them to proceed in any other manner than shall be adjudged by the king's courts to be the true meaning of this act; therefore if this court shall award a consultation upon this point, it is final, and this sentence cannot be corrected by any appeal.

Because the ecclesiastical courts did before this statute exercise a kind of jurisdiction of distribution, of which notice is taken by the act, as if it were legal; whereas by our law no such jurisdiction was allowed, but prohibitions were sent to restrain them therein, and this act intended to restore this jurisdiction.

It will not be amiss to take a short view of the history of their practice.

Ecclesiastical courts anciently grasped at a large jurisdiction *De Debitis & Catallis* upon pretence of taking cautionary oaths to perform contracts and such like, and then upon breach thereof did proceed *Pro læsioni Fidei*; but by statutes and mandatory writs they were contained within their due bounds not to meddle *De Debitis & catallis* (which were temporal things) *nisi de Testamentis & Matrimonio*.

In the jurisdiction *de Testamentis & de Debitis & Catallis* relating to them, their power was very large by the common law; for if there were no will appearing, the ordinary had the absolute disposal of the estate.

If they would not pay debts with the estate, yet they were so far intrusted that they were not subject to suit until 13 E. 1. *Westm.* 2. c. 19. which subjected them to the suit of the creditors in the same manner as executors were.

Upon this their meddling with deceaseds estates, which was very beneficial before, became very troublesome, and to free themselves from it they were fain to put the administration

tration * thereof into third persons hands, who might give * P. 498.
them security to save them harmless from suits.

17 E. 3. When it was desired in parliament, that administrators might have the power to sue, it was answered, that the ordinaries might sue sith they were to answer; whereby it appears that parliament would not discharge them of the burthen, or take notice of administrators otherwise than as their servants or attornies:

But 13 E. 3. eased them in this particular, for they being thereby bound to grant administration to the best friend of the intestate, and the administrators being made as executors, they retained only the safe jurisdiction of granting administration and calling the administrators to account.

The common law was hereupon to judge who were the best friends, and therefore if there were husband or wife, in default of them, son or daughter, in default of them or their children, father or mother, in default of them, brothers or sisters, in default of them or their children, uncles or aunts, the ordinary was compellable to grant administration to them in their several orders.

They were bound to grant to the next friends, if they were loyal, but if they were many in equal degree, perhaps they were not bound to grant administration to all, but might choose the most fit person for avoiding confusion.

22 H. 8. This was made plain, for thereby they had a liberty expressly provided to refuse the wife, if they pleased; and if they were many in equal degree of the next of kindred, to grant administration to which they please, and refuse the rest, which liberty was a great advantage to their jurisdiction.

For they would choose him that was most obsequious to them, and when they called to account upon pretence of bestowing the overplus for the good of the deceased's soul (a device in those popish times to make profit to the clergy) they disposed the overplus as their own.

Upon the reformation that pretence vanished, but they thought it allowable to distribute the overplus amongst the kindred, according to the rules of the civil law, *de Successoribus ab Intestato*. And this was so reasonable, that they used that course without blame a great while, and inserted a clause into all their bonds for security to account to the ordinary, that the overplus upon such account should be distributed as the ordinary should appoint:

Which was more than they could justify, and it came to be questioned in *Slany's* case, *Hob.* 83. and *Moor* 864. but ended

* P. 499. ended * by reference, and afterwards in *Took and Lawne's* case, *Hob.* 191. The administrators were willing to make a reasonable distribution; but their adversaries not being satisfied, appealed to the delegates, which unreasonable opposition drove the administrators to the king's courts, where it was resolved that he was not compellable to make any distribution at all; and accordingly it was resolved in *Fotherby's* case, 2 Car. 1. 1 Cr. 62. and *Levannus's* case, 6 Car. 1. 1 Cro. 201. whereby the law came to be settled and known, that they could neither compel administrators to make distribution by suit in the spiritual court, nor sue any bonds taken for that purpose.

The only way then left for them was this, whilst they were under deliberation whether they would grant administration to the wife or next of kin, and to which of the next of kin, they did treat with the parties, and consider what sum the overplus was like to amount unto, how that ought by their rules to be distributed, and they would prefer him to the administration that would beforehand perform such distribution by payment of monies, and giving security to persons unto whom it was appointed; and this practice held till the making of this act whereon the question arises.

The occasion of making this act was, because it was found very inconvenient for any administrator to pay before he received; it was hard for him to know what he might undertake before he had possession, and the judge could not have a perfect knowledge of the true value of the overplus to give him in the measure of his distribution till after the administration ended, and the account of the estate taken.

There were public inconveniencies, which were urged to the parliament by the civilians, who yet had another reason to desire the former methods might be changed; for the allotting distributions in this manner was but a barren jurisdiction that could not be drawn out in length; all disputes were ended *uno flatu* without appeal, and the accounts of administrators were never contested when there was no adversary concerned to demand a share in the overplus upon taking them.

Having said thus much concerning their practice before the act of parliament, and the causes of making this law, I will now proceed to the exposition of it.

The statute is *Introducivum novi juris*, and therefore ought to receive a strict interpretation in restraint of distributions, which are hereby introduced against the policy of former laws.

Before

Before the statute the administrator that had all the burden of the administration had likewise the benefit, and when he had paid all the debts and legacies, was never more questioned upon his account, because no man could demand the overplus from him; but now by this law the overplus is given away, and he is to have no part of it, but as he stands related to the intestate, no recompence for his pains, no more than he should have had if another had been administrator. And here is not only *Lucrum cessans*, but *Damnum emergens*, for at the end of his administration he must give an account, which will be disputed by the parties concerned, and if he hath not acted very cautiously may bring a considerable loss upon him. * P. 500.

Methinks we should expound this act as much in favour of administrators as we can in restraint of distributions and remote representatives, that are brought to participate of the benefit of the administrators thrift and good management.

But I admit that all acts of parliament are to be expounded according to the true meaning to be collected from the words of them, and that must be a rule in this case; therefore I will endeavour to find out that meaning, 1. By considering the reason of distribution, and the practice in the ecclesiastical court grounded upon that reason, as it was before this statute. 2. By considering the words of the act relating to this clause.

As to the rules of spiritual courts in ordering distribution, I should have been glad the parties would have brought civilians to have informed us concerning the grounds of their law and practice in this particular.

Not having had that assistance, I have considered in the best manner I can upon the nature of the thing, whereupon I apprehend there are two motives of distribution, one in respect of the intestate, another in respect of the ordinary that grants administration.

In respect of the intestate it may be thought an obligation upon every man to provide for those which descend from his loins; and as the administrator is to discharge all other debts; so this debt to nature should likewise exact a distribution, to all that descend from him in the lineal degrees, be they never so remote.

And because those which are remote have not so much of his blood, therefore the measure should be according to the stocks, more or less as they stand in relation to him.

Upon this reason representations are admitted to all degrees in the lineal descent.

There

* P. 501.

* There is no such obligation to the remote kindred in a collateral line, therefore they are not regarded but in respect of proximity as they are next of kin, it being to be supposed, every man would leave his estate to his next kindred: but the children of those that are deceased come not within this reason, for they are a degree more remote.

In respect of the ordinary it may be considered that those that are of equal degree and next of kin, be they never so many, ought to be looked upon by the ordinary with an equal eye, therefore when he has preferred one to the administration, he ought to give some recompence to the others, that he may not appear partial, they being as capable to demand and have administration as the other. But the children of those which are deceased have not the same pretence; for they were not capable to contest the administration.

Another reason there is to exclude representations in remote degrees, that thereby the estate might come to be divided into so many and so small parts that the benefit would not be valuable.

I have heard civilians say, that representations are rejected in remote degrees of collaterals by their law upon this ground.

Now the case of brothers children is of a mixed consideration, 1. In respect of the obligation, for the intestate was a kind of parent to his brothers children, and in that respect marriages between them are prohibited. 2. There is no danger that the subdivisions should be very many and the estate reduced into very small parts; for brothers and sisters cannot be many, as cousin germans and other remote degrees may, therefore there may be reason to admit brothers children to distribution by representation, and reject all farther degrees.

Having touched the reasons whereupon I suppose distribution grounded, concerning the practice, I can only say what I have learnt by enquiry from civilians of my acquaintance, having had no other means to be informed of it, the bar not having produced any precedents of the spiritual courts on either side.

In the case at bar the order of the spiritual court is for a distribution to the brothers children of the collaterals, who are not the intestates brothers children; and by that it should seem as if their law (if we should let them alone) would carry on the distribution by representations to a more remote degree.

But

* But I have been informed by eminent civilians of my acquaintance, I suppose I may name them without their displeasure, sir *Leoline Jenkins*, judge of the prerogative court, and sir *Robert Wiseman* dean of the arches, that it is the constant and clear practice of their court to reject all representations of collaterals, except children of the intestate's brothers and sisters. P. 502.

I am sorry the plaintiff in this prohibition did not seek redress by way of appeal, that we might have seen what would have been finally ordered in their law, by which we might have known how their law stood, as to this point, which might have given us some light towards the understanding this act.

I must confess that I do acquiesce in the opinion of those learned men, and take their law to stand in this point for the exclusion of all representations to remote collaterals. I give little credit to the sentence in this cause: I remember the same judge, the archdeacon of *Huntington*, the other day ordered distribution amongst the kindred of the first intestate upon an administration *cum Testamento annexo*, where the *residuum bonorum* was devised to the executor, who died intestate, whose next of kin ought clearly to have had it, which occasioned our granting a prohibition upon sight of the sentence. This being the same judge, I have the less reverence for his opinion in the other matter.

I will now consider the words of the act of parliament, whereupon this question ariseth, they are these,

[*The residue of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree, and those who legally represent them.*

Provided that there be no representations admitted amongst collaterals after brothers and sisters children.]

Upon these words, the question is thus, Whether in the collateral line only the intestate's brothers and sisters children can be admitted to have distribution *Jure representationis in loco parentis*, or whether representations are admitted in remoter degrees of collaterals to the children, of such as were brothers and sisters to the collaterals.

In short, whether the words *brother* and *sister* shall relate to the intestate, or to the collaterals.

I hold, that the words of the act must be understood of brothers and sisters to the intestate, and not of brothers and sisters of remoter collaterals; for these reasons:

* 1. All other relative terms generally expressed through the whole act have the intestate for their correlative, so (*wife*) is meant wife of the intestate, (*children*) are children P. 503.

H h

dren

Term. Hill. 34 & 35 Car. 2. B. R.

dren of the intestate, (*heir at law*) is of the intestate, so that in the most plain and obvious sense, the intestate ought here to be taken for the correlative to the words brothers and sisters.

2. My second reason is, Because the distribution is given by the act for their relation to the intestate, and not for their relation to the collaterals, therefore the relation mentioned ought naturally to refer to the intestate, and not to the collaterals. There may be cases put wherein brothers and sisters children of collaterals may be no kin to the intestate, if they were by the half blood, and it cannot be pretended that such shall have a share in the distribution. Now why should the words be taken in the sense that comprehends those that have no title to distribution?

3. My third reason is, Because as these words comprehend more than ought to have distribution in some instances, so they fall short and leave out many that by parity of reason ought to have distribution, and therefore this sense they would put upon the words is very improper.

As for instance.

Suppose the next of kin are nephews by several brothers, and some of them are dead, leaving children, these children are not brothers children to the collaterals, and cannot within the words claim any share; but if by chance any of them had had uncles surviving, then they had been brothers children to the collaterals.

So if the next of kin are cousin-germans, and some of them are brothers to one another, others are not; the children of such of them as had brothers that survived the testator shall have a share, but the children of such who had no surviving brothers shall have no share, which is most absurd, for they ought to have a share as they relate to the intestate, and not as they relate to the collaterals.

I must needs say it is hard to imagine the parliament could oversee these absurdities which are so plain in consequence, and they had been so easily avoided, that we ought for that reason to believe, that they meant the relation to the intestates in this as well as other places.

If they had meant the relation should have been to the collaterals, how easily might it have been expressed so, and by words that would have brought in all cases in parity of

* P. 504.

degree, as if it had been thus expressed (*Provided that there be no representations admitted amongst collaterals after their children*)

This had been without ambiguity or question, and it had extended

Term. Hill. 34 & 35 Car. 2. B. R.

extended to all cases *in pari gradu*, and to no case but where there was kindred to the intestate.

I cannot imagine the parliament meant to let in representations in remote degrees, because they might so easily have expressed it in plain terms, and they would certainly have done it in this act, which is carefully penned in other parts of it.

4. A fourth reason is, Because the excluding representations in a remote degree agrees with the reasons upon which distribution is grounded. For, 1. Nephews and nieces to the intestate are of so near relation, the intestate having been as a parent to them, that they are of great regard, whereas remoter degrees have no regard but for their proximity (because there are none nearer) and therefore no reason to admit representations amongst them, to bring in a remote degree to share with those that are nearer of kin. 2. Again, Nephews and nieces cannot be many, so that the division cannot come into very many parcels; but in a remote degree there may be very many of the same degree, and to admit a subdivision to the children of any deceased would make the shares of such children very inconsiderable, not worth demanding.

5. My fifth reason is, Because by the opinion of the learned, the law and practice of the spiritual courts before this act did exclude all representations of collaterals, after the intestates nephews and nieces.

The whole scope of the act was to make their jurisdiction as to distribution legal, which before was condemned by the king's courts, and the words of the act (*legally representing*) (*pro suo cuiq; jure*) and (according to the laws in such cases) and (the rules and limitations set down) shew that there is a reference to their laws. Now if there were an opinion this way before the act; there is great reason to believe this clause was founded upon that opinion, and to expound it that way. I never heard of any opinion that before the act the representations were bounded to brothers children of collaterals. It may be the learned Doctor who hath ordered distribution in this case, has done it upon an imagination, that this clause has changed their law in this particular, taking it in that sense that my brothers do that have argued against me.

* I shall now observe the objections that are made a- * P. 505.
gainst me.

1. *Object.* They say, *Ad proximum antecedens fiat relatio*, and the next precedent relative is the word *Collaterals*.

Sol. This maxim hath always this restraint, that it must
H h 2 agree

agree with the sense, so that it admits an enquiry which relative best agrees with the sense, and we must judge according to the sense, and not by the order of words.

2. *Object.* They say it is strange this *Proviso* should restrain representations of collaterals to one particular case, which were left under a generality before.

Sol. I see no cause of wonder, if it were so; but that which is called a generality, is by the words (*legal representatives*) and if by the course of their law representations were not admitted to other collaterals than brothers and sisters children, then those remoter degrees had no legal representations; so that this clause is but explanatory of the word (*legal*) in the sense of their law, our law having no notice of it at all.

3. *Object.* They say there is no inconvenience in the other exposition, but it seems reasonable that the nephews in all cases should have a share with the uncles.

Sol. I have already shewn by my reasons, that by the other exposition the symmetry and reason upon which distribution is grounded fails, and many absurd cases will follow upon it.

4. *Object.* Then they object that there are few acts of parliament that provide for all cases; there are *Casus omitti* upon the most clear laws, and the sense of an act must not for that be lost.

Sol. I confess a law clearly penned shall have its force in cases it does reach, though it does not reach all cases; but where a law is penned, that it may be expounded one way or other, and there is a question of the meaning of it, it is more natural to believe it was meant in that way that is clear, and that reaches all cases that are in parity of reason, than in that way that has absurd consequences, as this hath, both by including those which were not intended, and leaving out those which stand in the same degree, as I shewed before.

To conclude, I conceive this act was intended for a plain rule, and I think it much better to interpret it in the most plain and obvious sense which will establish the succession of personal estates, according to reason and symmetry, than to strain to find out another sense for the sake of remote kindred, that are of no regard, which will produce apparent absurdities, * and subject personal estates to fanciful and intricate disputes, that will need another act to compose and settle.

Term. Hill. 34 & 35 Car. 2. B. R.

Having desired the opinion of the learned Doctors of *Doflors-Commons* upon the question following,

Whether before the late statute of 22 Car. 2. for settling intestates estates upon ordering distributions, representations were admitted amongst collaterals in remote degrees? or, Whether there were any bounds set by their law or practice beyond which representations were rejected, and what those bounds were? or, Whether it was not merely discretionary as the ordinary thought fit? I received this answer from them:

In making distributions of intestates estates amongst collaterals, our civil law, and the practice of the ecclesiastical courts have constantly observed these two rules.

The first is, *Repræsentatio in filius fratrum & sororum tantum locum habet, ad ulteriores vero Collaterales non extenditur.*

The second is, That in case there be no brothers nor brothers children, *vocantur ad successionem reliqui Collaterales quicunq; in gradu sunt proximiores, remotioribus exclusis. Ita quod infallibiliter semper prior in gradu sit potior in successionem*, whereby representation must needs be out of doors, the next of kin, whether one or more being only to be admitted to the distribution.

10 May 1681.

Robert Wiseman,
Thomas Exton,
Richard Lloyd,
Edward Master,
William Trumbal.

A TABLE



AB

N

Pay

A

W

In

A

T A B L E

OF THE

PRINCIPAL MATTERS

CONTAINED IN THIS BOOK.

ABATEMENT, see **PLEADING**.

MANY things may be pleaded in bar and in abatement too, Pages 57, 395.

Payment to the plaintiff, or a stranger, is a plea in discharge, and yet it may be pleaded in bar, *ibid.*

A plea in abatement *Puis darrein continuance* in a real action is peremptory, 118, 119

Where an action founded on contract is brought against two, and the one dies, the writ shall abate, although they are executors; but in actions of trespass which are grounded upon a tort, the death of one shall not abate the writ, 131, 463

In an *Indebitatus Assumpsit* by five executors for monies received to the testator's use: the defendant pleads in abatement that two of the plaintiffs are under the age of seventeen years; the plaintiff

demurs; and if the third that was full of age, and the infants, ought to join, was the question; but not resolved, Page 198

ACCORD.

Accord is no good plea to an action of trespass and assault, executed in the whole, 203

In an *Indebitatus Assumpsit* for wares sold; the defendant pleads an agreement betwixt the plaintiff and the defendant, and the son of the defendant, that the plaintiff should deliver to the defendant divers clothes of the defendant's wife's, then in her custody, and that the plaintiff should accept his son for her pay-master for 9 *l.* in full satisfaction of the *Assumpsit*, and shews the delivery of the clothes by the plaintiff, and that the son at the day tendered the 9 *l.* and the plaintiff

A T A B L E O F T H E

tiff refused it; and that the son was always since, and yet is ready to pay the same; the plaintiff demurs. For although as was alledged, of ancient time the pleading an accord without execution of the whole, was not good, according to the resolution in *Peyto's* case, yet of late it hath been held, that on mutual promises an action lies, and consequently there being equal remedies, an accord may be pleaded without execution; which was agreed by the court, *Page* 450

Yet in the principal case judgment was given for the plaintiff. 1. Because it doth not appear that there is any consideration that the son should pay the 9*l.* but only a bare agreement. 2. Admit the agreement would bind, yet now by the statute of frauds and perjuries, this agreement ought to be in writing, or else the plaintiff could not have any remedy thereon; and though on such agreement the plaintiff need not set forth the agreement to be in writing; yet when the defendant pleads such an agreement in bar, he must plead it so as it may appear to the court, that an action will lie upon it; for he shall not take away the plaintiff's action, and not give him another upon the agreement pleaded,

450

Arbitrement is a good plea, without performance, *ibid.*

A C C O U N T.

In account, and judgment *quod computet*, the defendant before auditors pleads a special plea, (*viz.*)

the act of oblivion, and it seemed to the court to be a good plea, and needed not to be pleaded in bar to the first action,

Page 57

When the plaintiff in account charges the defendant as receiver from such a time to such a time, he ought to answer precisely,

ibid.

A C T I O N, and A C T I O N upon the C A S E.

Upon a wager, whether the eldest son of a puiſne knight bachelor, or the grand-child of an elder knight bachelor should have the precedency by the judgment of an herald

5

Action upon the case lieth not for a legacy,

23, 24

Action upon the case, the plaintiff declares that he was seised of an ancient messuage, &c. within the parish of S. and that he, and all those whose estate he hath in the same, have time out of mind used to sit in a seat in such an aisle in the said church, and that the defendant had disturbed him; after verdict for the plaintiff, it was held, that the count is good, without shewing any reparation; otherwise in a prohibition, 52

Action upon the case brought against the *Custos Brevium & Rotulorum*, for that by his negligence a judgment was razed,

53

Action on the case lies *quod crimen Feloniæ ei imposuit*,

61

Action upon the case lies for a false return on a *Mandamus*, 68, 432

In an action of the case for stopping his lights, the case was, that H. seised

seised

PRINCIPAL MATTERS.

seised of a piece of ground, and building a messuage upon part of it, he grants the other part of the said ground to *A.* who builds upon it, and obstructs the lights of the first messuage; and by the better opinion held that he may,

Page 87

An action upon the case doth not lie for maliciously indicting one of Rescous, or for the malicious indicting one of a trespass, 135

An action on the case lies for maliciously indicting the plaintiff, being a justice of the peace, for delivering a vagrant out of custody without examination; for that here's slander as well as crime, 180

An action on the case in the nature of conspiracy lies for levying a plaint to cause the plaintiff to be arrested without cause, 176

An action of the case in the nature of conspiracy lies against one only for indicting the plaintiff of Barretry, 180, 176

In an action of the case the plaintiff declares, that he did lend his gelding to the defendant to ride from *London* to *York*, and the defendant abused him *in itinere*; after verdict for the plaintiff, in stay of judgment it was moved, that there is not any visne where the abuse of the horse was, but only *in itinere*; and judgment stayed until, &c. 187

An action on the case lies against an attorney for entering judgment against a defendant before the rules were out, by reason whereof he was prevented from moving in arrest of judgment, 194

An action of the case for keeping a market in prejudice of the plain-

tiff's market does well lie, although the defendant does not keep his market on the same day the plaintiff keeps his, Page 195

An action on the case doth not lie for the loss of the service of his apprentice for the whole residue of the term of his apprenticeship, till the same term be expired, 200, 201

An action upon the case lies against the master of a ship for keeping goods so negligently that they were stolen away whilst the ship lay in the river, 220

An action on the case lies against a bishop for not taking caution, if the party excommunicated requires it, 226

The father shall not have an action for the loss of the marriage of his son and heir, except when a stranger takes him by force and marries him; but if the son marry himself, or a stranger procures him to marry one, the father hath no remedy, 259, 260

The father cannot maintain an action for the assault of his daughter, but only by reason of the loss of her service; *Per Raymond* baron, 260

In a special action of the case the plaintiff declares, that he is a hackney coachman, and that the defendant, with an intent to disgrace him, did ride skimmington, and describes how, thereby surmising that the plaintiff's wife had beat the plaintiff, and by reason thereof persons who formerly used him, refused to come into his coach to be carried by him *ad damnum*; after verdict for the plaintiff, judgment was given, *quod querens nil capiat per Billam*, 401. In

A T A B L E O F T H E

In an action of the case for not grinding at his mill; where one prescribes for multure, he ought to aver that his mill is sufficient to grind all the corn, Page 327

An action of the case lies for maliciously prosecuting the plaintiff in the ecclesiastical court, for not making his account as churchwarden of the parish of D. the defendant knowing that the plaintiff had made his account before, which was approved of by the parish, 418

Every man shall recover according to the right he hath at the time of the bringing the action only, 463

And therefore if the heir brings an ejectment, and his ancestor dies subsequent to his action, he shall not recover, *ibid.*

ACTION for WORDS.

The defendant being seised of lands said of the plaintiff, he had forged a deed to cheat him of his land, and he gave A. B. 40s. for ingrossing it, an action lies, 4

I will indict Richard Rawlins at the next sessions, and he shall lose his estate, and it shall go hard with him for his life; but his estate he shall surely lose for marking my sheep, not actionable, 12

Nuttal that was Solomon Smith's clerk is a knave and a rogue, and I will prove it, and he is in Newgate, and is to be hanged for counterfeiting the king's hand and seal, adjudged actionable, 17

He is a base fellow, and I will question him ere long, for that he would have taken away the king's life; it seemed to the court that the words were actionable, because

in the case of the king the intent is punishable Page 20

Thou art a traitor and a rebel, 23
Thou hast stolen our bees (innuendo a stock of bees) *they are hidden under the old woman's hempseck, and thou art a thief;* after verdict judgment for the plaintiff, 33

Thou art a thief and hast stolen my trees, actionable; for it shall be intended such trees whereof theft may be committed, *ibid.*

Dacy is a witch, and deserves better to be hanged than old Arthur, who was hanged for a witch, adjudged actionable, 35

Orton says, *I am a perjured knave, but he is a perjured knave as well as I, for he and Field swore for one another,* actionable, 51

If words are actionable at first, the damages after doth not give cause of action, and therefore the statute of limitations of two years is a good bar in that case, 61

But where the words at the time of the speaking are not actionable, but by reason of them the party after loses his preferment, in that case the statute of limitations of two years is not any bar, *ibid.*

To call a tradesman a cheat, an action will lie if he speaks of his profession, but to speak it generally it will not, 62

You are a whore, &c. per quod she has lost her marriage; on verdict and judgment for the plaintiff in the *Marshalsea*, assigned for error, that it doth not appear that the cause of action, *viz.* that the loss of the marriage was within the jurisdiction of the court, and the other words are not actionable, and judgment reversed, 63

The plaintiff declares that he is and hath

PRINCIPAL MATTERS.

hath been, and was such a day the master of a bark; the defendant said to him, *thou art a cheating knave and a cheating rogue, and thou hast cheated my son-in-law, John Bradley, of a cable rope which belongs to the bark, if actionable, quare.* Page 75

An action brought by a reeder for these words, *you cheated Mr. Rawley of a pinnal of reed, not actionable,* 75

The plaintiff brings an action in London for these words, *thou art a whore and my husband's whore, and the defendant removes it by Habeas Corpus into this court, and a Provedendo was granted by three justices, Hide chief justice dissenting,* 81

The plaintiff counts that he is a lime-burner, and gets his living by buying and selling thereof, and that the defendant said of the plaintiff *in arte sua, that John Terry is a run-away, and is a base cheating rogue, and John Terry shall never think to bring John Webb where he is himself, and rather than so I will spend* 201. The court was divided touching these words, and no judgment given, 87

In ancient time it was the constant course in declarations for words, to lay a *Colloquium*, and it was a grand doubt if it was good without it, until *Smith and Ward's* case in *Cro. Jac.* and there resolved *de Querente* supplies the *Colloquium*, *idid.*

Thou art a baud, and I will prove you a baud, and you took 5 s. for a clean pair of sheets for two whores and two rogues; it seemed to the court the words are actionable,

Page 115

The plaintiff declares he is a mercer, and that the defendant said to him these words, *thou art a cheating knave and a rogue, not actionable,* 169

The defendant said of the plaintiff being a merchant, and maintained himself and his family by buying and selling, *Austen Drake is broke and gone to Virginia, I have ill fortune, for Austen Drake is failed, and I have lost my monies; Austen Drake is a beggarly fellow, and not worth a groat, and not able to pay his debts, and rides abroad with his man double armed for fear of bailiffs, held actionable,* 184

The plaintiff declares, that he is an attorney of C.B. and that the defendant and he had discourse of the plaintiff, and of his profession, and that the defendant said to the plaintiff *in auditu quamplurimorum, thou canst not read a declaration, actionable,* 196

The plaintiff declares, that he was at the time of the words spoken, and yet is a merchant, and that there being communication of him, the defendant spake these words of him, *I believe all is not well with Daniel Vivian, there are many merchants that have lately failed, and I expect no other-wise of Daniel Vivian;* adjudged for the plaintiff, 207

The plaintiff declares, that he is a keeper of livery stables, and an Inn at the *Bellsavage*; and the defendant had other stables for the said purpose, in the same yard; a stranger comes with a waggon into the same yard, and demands of the defendant which

is

A T A B L E O F T H E

is *Bellsavage-Inn*; the defendant replies, this is *Bellsavage-Inn*, deal not with the plaintiff for he is broke, and there is neither entertainment for man nor horse; after verdict for the plaintiff, judgment was given for the plaintiff after much debate, *Page 231*

The plaintiff declares, he being a clergyman, the defendant said of him these words, *viz. Francis Wall is a thief, and he stole plate from Maudlin College in Oxford, and I bought plate of one in Oxford, and gave it to the college for that plate, and thereby saved him from being hanged, ad damnum 500 l.* The defendant pleads in bar by attorney, that *ante diem 1 July 12 Car. 2.* the plaintiff married the defendant, and the plaintiff demurred; and adjudged for the defendant though pleaded in bar,

395

The plaintiff declares he was such a day deputy lieutenant for the county of *Middlesex*, and one of the king's privy council for the realm of *Ireland*, and stood to be chosen burgess for the parliament at *Christ Church*, and that the defendant spake these words of him, (*viz.*) *he is a Papist*; and adjudged the words were actionable, and judgment affirmed on a writ of error brought thereupon,

482, 483

The sense of words alter as the times alter, for though formerly (*Papist*) was not actionable, yet now it is grown a word of reproach; so to say of an attorney he is a *knave* anciently was not, but now it is actionable,

482, 483

ADJOURNMENT.

All adjournments of the sessions are in the preter-tense, and so of indictments, *Pages 115, 116*

ADMINISTRATION.

It's in the power of the ordinary to commit administration to the wife or next of kin; but when he hath committed it to one he cannot repeal it, and commit it to another,

93

The father is next of blood to his child to whom administration shall be committed, *ibid.*

Administration is committed to *J. S.* who grants the goods of the intestate, and after suit is in the court christian by citation to repeal this administration, it's there confirmed, and after an appeal is brought of that sentence, and the sentence and also the administration is reversed; yet adjudged notwithstanding, that the grant of *J. S.* is good,

224

A man dies intestate, having neither wife nor child, nor father nor mother; but his next of kin being two aunts, one whereof was dead in his life-time, and the other having administration, the question was, whether the children of the deceased aunt shall be admitted *Jure representationis in loco parentis* to demand a share upon the act of distributions, as their mother should have had if she had been living?

496, 497,

498, &c.

It seems an administratrix *durante minore etate* as she may sell goods for payment of debts, so she may retain

retain

PRINCIPAL MATTERS.

retain to pay herself, by *Raymond* justice, for that she cannot pay herself, therefore the payment must be by way of retain-
er, Pages 483, 484

ADMIRALTY, vide PROHIBITION.

Prohibition lies to the admiralty upon a suit there for mariner's wages, 3
A sentence in the admiralty of France is not examined at common law, but the courts there ought to give credit to it, 473
If any person finds himself aggrieved by such sentence, his way is to petition the king, who will examine the case, and if he finds cause of complaint, will send to his ambassador, residing with that prince or state, and on failure of redress will grant letters of marque and reprisal, *ibid.*

AMENDMENT.

In debt upon an obligation against an executor, the defendant pleads it's not the deed of the testator; and found for the plaintiff, and judgment *quod defendens capiatur*, where it ought to be *in misericordia*; and it was moved to have it amended; but ruled it cannot be amended in another term, 38, 39

But in the Common Pleas it may be amended, for there are dockets of every judgment; and if the entering of the judgment be defective in the roll, they use to mend it by the docket, *ibid.*

In ejectment by *John Wilde* against *Thomas Wheeler*, the judgment

quod præd. Thomas recuperet, where it ought to have been *John*; and it was amended, P. 39
In an ejectment of ten acres of land, and five acres of pasture, and in the judgment the ten acres of land were omitted, and yet amended, *ibid.*

In debt upon the statute of 2 E. 6. for tithes, and upon a nonsuit in the judgment *quod defendens eat sine die* was omitted, and yet amended, *ibid.*

In an action of the case for words against husband and wife, judgment was, that the husband only shall be *in misericordia*, and nothing said of the wife, yet amended, *ibid.*

In an action on the case part is found for plaintiff, and part for the defendant; and as to that that is found for the defendant, the judgment is *quod querens & plegii sui sint in misericordia*; and moved that the judgment should be amended, & *plegii sui* struck out, because they ought not to be amerced; but the court took time to consider of it, 42

Error of judgment in the Common Pleas was assigned, that there were not any pledges; but it appearing on examination there was an original, an amendment was awarded, 51

Records have been frequently amended after error brought, 53

A record may be amended before a *recordatur* entered upon the roll, *ibid.*

The record of the *Nisi prius* roll varying in substance from the plea roll, a *Disfringas de novo* was awarded, agreeing to the plea roll, 38
In

A TABLE OF THE

In covenant, the plaintiff counts that he demised to the defendant certain land for thirteen years, to pay to him quarterly 40*l.* and doth not say *annuatim*; the defendant pleads *Non est factum*; and found for the plaintiff, and after plea pleaded the plaintiff amended his declaration, and inserted the word *annuatim*; and ruled the amendment to stand,

Page 160

In debt on a bond, judgment was had by default by the plaintiff as executor, and the attorney had left out, *Et profert hic in Cur. literas testamentarias*; but the plaintiff was called executor in the declaration; and the defendant having brought error, it was moved to have the record amended, but denied,

223

After a record entered it's too late to have it amended,

64

ARBITREMENT.

Attachment denied to be granted for the breach of a rule of court had by consent for the performance of an award,

35, 152

On no arbitrement pleaded the plaintiff replies, and sets forth the award, which (amongst others) consisted of two parts, 1st, That the defendant should make a release to the plaintiff until the time of the arbitrement, which, as was objected, discharged the bond of submission; but disallowed, because divers things are to be done together, and if all had been done the release had been no prejudice. 2^{dly}, The award was in part of satisfaction, which is not good but disallowed, because

it's *tantum exister, partem redditus*, which is only a description when he will pay it; and no discharge,

Page 169

A submission to arbitrators and umpire at the same time without increasing the time of the umpire, is void,

187, 203

ASSIGNMENT.

In debt for rent against the assignee of an executor of a lessee for years, the defendant pleads an assignment by him to J. S. such a day before any rent was arrear, and that he gave notice of it to the lessor before any rent due; the plaintiff replies, that the assignment was to defraud him of his action by fraud and covin; the defendant demurs, and judgment was given for the plaintiff in B. R. and the defendant brought a writ of error, and after the parties agreed,

303, 304

Declaration in debt for rent arrear, is good, without shewing mean assignments on demurrer,

389,

390

A covenant not to assign a thing in action to any person or persons whatsoever. An assignment in equity is a breach of the covenant; for in law no assignment can be of a thing in action, therefore the intent of a covenant must be of such an assignment as can be (that is) an assignment in equity,

459, 460, 461

ASSUMPSIT.

In consideration that the plaintiff would give to the defendant 5*l.* the defendant would give to plaintiff

tiff

PRINCIPAL MATTERS.

tiff 40s. if ever he played at a game called *Even and Odd* for money or wine, and avers he gave him 5s. and that the defendant played at the said game such a day, *unde actio accrevit*; held the action lies, Page 13

That whereas the husband of the defendant, now dead, was indebted to the plaintiff, the defendant promised that if the plaintiff would make appear that her said husband was indebted, she would pay it; a good *Assumpsit*, 32

A promise before breach may be discharged by parol, 42

On an *Indebitatus Assumpsit* for physic, &c. provided and delivered for the daughter of the defendant at his request, after verdict for the plaintiff it shall be intended delivered to the defendant for his daughter, 67

If the father desire one to find physic for his daughter, debt lies against the father, and consequently an *Indebitatus Assumpsit*, ib.

The plaintiff declares that the defendant in consideration of 10l. promised to let him enjoy certain iron mills for six months; and it appeared the said mills were but worth 20l. *per annum*, and yet damages given for 500l. by reason of the loss of stock laid in; and held the jury may well find such damages, for they are not bound to give only the 10l. but also all the special damages, 77

The plaintiff counts, that whereas he had procured one *W.* at the request of the defendant, to surrender a lease, that the defendant would pay, &c. without

saying that the defendant assumed and promised to pay, &c. and judgment stayed on motion in arrest of judgment for that cause, Page 123

Assumpsit by the heir to pay a debt due by his ancestor upon an obligation, without declaring that the heir was bound thereby, *Quere* if good after verdict? 127

In consideration the plaintiff would take an oath before one who had not power to administer it, is a good consideration to ground an *Assumpsit* on, 153

The plaintiff declares that he and the defendant were executors to *A.* and that the defendant did receive all the estate of the testator, whereas a moiety thereof did belong to the plaintiff, and that the plaintiff did threaten the defendant to sue him to come to an account, and that the defendant in consideration that the plaintiff did promise to forbear the said suit, and to shew an account touching the estate of the testator; the defendant promised to pay to the plaintiff 100l. the plaintiff avers that he did forbear the said suit, and did shew an account, and yet he hath not paid the 100l. Judgment for the plaintiff, 230

The plaintiff counts that one *Fenwick* was in arrear to him in 100l. for an annuity, and that the defendant was bailiff and receiver of his rents, who appointed the defendant to account with the plaintiff, and to pay all that should be found in arrear to him, out of the next rents due at *Martinmas*, and that on account there was 100l. found due to the plaintiff, 7

A T A B L E O F T H E

tiff, and the defendant *adhuc existens receptor* of the rents of the said *Fenwick*, assumed to the plaintiff that if he would forbear the said arrears for a month after *Martinmas*, he would pay the same, and avers he staid till then, and the defendant had not paid him; on *Non Assumpsit* verdict and judgment for the plaintiff,

Page 211

Assumpsit and *Trover* in one declaration seemeth not good, 233

In an *Assumpsit* the plaintiff declared, That whereas the plaintiff had at his own charges buried the defendant's child, the defendant promised to pay him his charges, and though there was no request laid, yet judgment was given for the plaintiff, 260

An *Assumpsit* lies for him who is to have the advantage of a promise, although the promise was made to another, 302, 303

A promise to pay money to the attorney of *A.* the action may be brought by *A.* or his attorney, 303

Forbearance to sue in chancery is a good consideration to ground an *Assumpsit*, 372

In consideration that the plaintiff at the special request of the defendant, would endeavour and labour to persuade *C. R.* to marry *J. S.* he did promise that he would pay the plaintiff 40*l.* if the said marriage took effect; the plaintiff in fact says, That he at such a day and divers other days and times at the request of the defendant *omnibus modis quibus poterat conatus fuit* to persuade the said *C. R.* to marry the said *J. S.* and that after such a day

the marriage took effect, and that the defendant had not paid him the 40*l.* &c. and though the plaintiff doth not shew how he did endeavour to persuade, &c. yet it was held good enough on error brought thereupon, *P.* 400

In consideration the plaintiff would renounce an executorship, the defendant would pay, &c. The plaintiff avers *quod renunciavit*; and held good, and yet perhaps the person before whom the renunciation was, might not be competent, *ibid.*

The plaintiff being a virgin had been prevailed with to make a contract with the defendant, and after the defendant was desirous to be free, and thereupon the defendant in consideration that the plaintiff would *disonerare*, Anglice *disengage*, him of his promise, he promised to pay her 1000*l.* and she alledges, that she did disengage him, without shewing how; and the whole court seemed to agree the declaration good, 400, 401

Though it is frequent to lay a declaration for a debt several ways in an *Assumpsit*, yet it's not a good plea to say that the several sums are but only for the sum first mentioned, without going farther, 449

ATTACHMENT.

Attachment doth not lie against a corporation, 152

Attachment denied to be granted for the breach of a rule of court had by consent, for the performance of an award, 35

Upon a judgment in *B. R.* a *Fieri Fac.*

PRINCIPAL MATTERS.

Fac. issued (after a *Testatum*) to the sheriff of *Chester*, who returns *Quod fieri fecit* the goods, but that they remained in his hands *pro defectu emptor.* on that a *Venditioni Exponas* issues, of which he makes no return, nor any satisfaction to the plaintiff, and for that an attachment was granted, Page 171

An attachment granted against commissioners of sewers, for proceeding after *Certiorari* directed, 186

If a writ of error be brought of a judgment in a pye-powder court, it is no contempt in the town-clerk if he doth not certify it, until final judgment given, for the writ of error commands to certify *Si Judicium redditum sit*, and an attachment denied, 190

An attachment granted against the bailiff of a liberty, who on a *Latitat* had arrested the defendant and taken sureties, and returned a *Cepi Corpus*, but never brought in the body, but combining with the defendant, let him go at liberty, &c. 193

ATTORNEY and WARRANT of ATTORNEY.

A warrant of attorney is given to one to confess judgment in debt to the plaintiff, at eight o'clock in the morning, and at ten o'clock, before the judgment signed by the secondary; the defendant dies. Resolved the judgment is well obtained, and shall not be set aside, 18

An attorney may plead and join issue, That the plaintiff is alive, and it shall not be error, although he be found dead, 59

The plaintiff obtained a judgment in debt, and received the money, and made a letter of attorney to acknowledge satisfaction, and after, and before satisfaction acknowledged, revokes his warrant. And the court gave rule, That no proceeding should be on the judgment without motion first made in court, Page 69

It's a good plea to action brought by an attorney for his fees, That the plaintiff did not give the defendant any bill of charges, according to the statute 3 *Fac.* 245
cap. 7.

ATTORNMENT.

If a copyholder surrender his reversion there needs no attornment, 18

The reversion of dutchy lands passes by the dutchy seal without attornment, 90, 91

A common person may compel the tenant to attorn, but the king cannot, for a *Quid Juris Clamat* doth not lie for the king, for that a fine by the king is always by render, 91

If a fine be levied to an use, the *Cestuy que use* shall have the rent without attornment, 91

Want of attornment is aided after verdict, 487

The reversion of a term for years granted for a valuable consideration, doth not pass by the statute of uses, without attornment, *ib.*

AUDITA QUERELA.

An *Audita Querela* is a new kind of action, and commenced only in the 10 *Ed.* 3. and not before, 89

A T A B L E OF THE

An *Audita Querela* doth not lie where there is another remedy in law for the plaintiff, either by plea, or otherwise, *Page 89*
Sometimes an *Audita Querela* doth not lie although there be not any other remedy. *In marg. ibid.*

AULNAGE.

Though aulnage is only payable for woollen cloth, yet it has been resolved that linsley-woolsey shall pay aulnage, though but part wool, *312*

AVOWRY, see PRESCRIPTION and REPLEVIN.

One having avowed for rent at *Michaelmas* is not estopped to distrain and avow for arrearages at *Lady-day* before, otherwise it is of an acquittance *21*

Replevin, the defendant makes cognisance to *A.* that one *Knight* was seised of the place, in which, &c. and granted a rent-charge to *A.* and so makes cognisance for 10 years. The plaintiff replies in bar, That *Knight* was not seised in fee. The defendant demurs, and leave given to discontinue, &c. *64*

Replevin, the defendant avows for a rent-charge. The plaintiff pleads in bar *Non concessit*; and on this issue is taken according to the statute of 17 *Car. 2. cap. 7.* and the jury found the value of the cattle, but not the arrears: and the court ruled judgment not to be entered on this finding, but the avowant may have judgment at the common law if he pleases, *170*

In a replevin, the defendant avows the taking, for that he is seised of the manor of *A.* to which he hath a leet belonging, and that by custom, time out of mind used, the inhabitants used to send a constable to the said leet, and that he before *H.* his steward at *A.* held the said leet, and gave notice thereof at *D.* and that they did not send a constable, and thereupon the said steward imposed a fine of 39s. 11d. and that he distrained the plaintiff; and held a good custom, *Page 204*

But because the avowant had not alledged a custom also to distrain, it seemed to *Twifden* justice, That the distress was not well taken, for when a duty is raised by custom, a distress for that duty must be maintained by the like custom, *204*

In a replevin, defendant makes cognisance as bailiff to the lord of the leet, because the plaintiff was amerced there for not scouring a ditch in a highway, plaintiff demurred, because the statute of 18 *Eliz. cap. 9.* gives the forfeitures for highways to the surveyors, and held the party may be punished in the leet, notwithstanding, *250*

If the rent of tenant for years be arrear, the lessor cannot avow upon the termor upon the land, but upon the matter, *257*

The different way of pleading in an avowry at common law, and upon the statute, *257, 258*

In an avowry for an amerciamment in a leet, it is not sufficient to say, *presentatum fuit* at the leet, that the plaintiff did such an act, but he must aver the thing, and not

PRINCIPAL MATTERS.

not rely upon the presentment,
Page 337

BAIL.

SPECIAL bail granted by the court in an action for words against a nobleman, 74

Notwithstanding a writ of error, the bail may bring in the principal in discharge of the mainpernors, 100

A person accused of high treason, and not within the act for *Habeas Corpus's*, is not *de jure* to be bailed by this court, 381

In a *Homine Repleg.* unless the defendant will confess the taking and having the party in custody, he cannot be bailed, 474, 475

BANKRUPT.

The plaintiff declares on the statute of bankrupts, That the defendant was indebted to one *Studder* and the plaintiff in a joint obligation. *Studder* becomes a bankrupt, and this debt is assigned to the plaintiff by the commissioners to the use of the creditors, if this assignment be good? *Quere* 6, 7

An assignee of commissioners of bankrupts brings an *Indebitatus* for 42*l.* upon an assignment of a debt due by contract of 43*l.* and upon *Non Assumpsit* on a special verdict, resolved for the plaintiff; for though in strictness it is not good, yet in favour of creditors it was held good, 7

Although the commissioners have sole authority to adjudge a man a bankrupt, yet in an action the

jury must find whether he was a bankrupt or no, Page 337

A trader in *Ireland* may be within the statute of bankrupts, 375, 376

Staley being a trader, becomes indebted by bond and judgment to *D. W.* in 100*l.* and to *Eliz. C.* in 100*l.* and to several other persons. The 5th of July 1677, *Eliz.* makes her will, and *J. Crew* her sole executor, and dies: the 6th of Novemb. 1678 *Crew* arrests *Staley* for 1000*l.* who presently puts in sufficient bail. 18 Novemb. 1678 *Staley* pays *D. W.* 1000*l.* and the same day renders himself to prison in discharge of his bail, and lies in prison to the time of the action, above two years. 20 Feb. 1678 a commission issues out, the 14 of May following the commissioners assign *Staley's* estate to the plaintiff. And the sole question was, whether *Staley* should be accounted a bankrupt on the 6th of Novemb. 1678, which was the day of his arrest, or only from the time that he rendered himself in discharge of his bail? And adjudged in *C. B.* That he shall be accounted a bankrupt only from the time that he rendered himself in discharge of his bail; after a writ of error was brought here, but left undetermined, 479, 480, 481

BAR, vide PLEADING.

Trover of divers goods, defendants plead an action of trespass *vi & armis*, brought against them formerly, for taking and disposing the same goods, and upon Not
I i 2 guilty

A T A B L E O F T H E

BARGAIN and SALE.

guilty pleaded, verdict for the defendants; judgment *fi actio*, plaintiff demurs; and adjudged for the plaintiff in this action of trover, because trover and trespass are actions sometimes of a different nature, for trover will sometimes lie where trespass *vi & armis* will not lie, Page 472

As if a man have my goods by my delivery to keep for me, and I afterwards demand them, and he refuses to deliver them, I may have an action of trover, but not trespass *vi & armis*, because here was no tortious taking, *ibid.*

Sometimes the case may be such, that either the one or the other will lie, as where there is a tortious taking of goods and detaining them, the party may have either trover or trespass, and in such case judgment in one action is a bar in the other, 472

Wheresoever the same evidence will maintain both the actions, there the recovery and judgment in the one may be pleaded in bar against the other, otherwise not, *ibid.*

In the principal case, it was said by the court, That it shall be presumed that the plaintiffs in the first action had mistaken their action, for they had brought a trespass *vi & armis*, whereas they had no evidence to prove a wrongful taking, but only a demand and denial, and so the verdict passed against them, and so forced to bring this new action; by three justices, *Dolben justice hesitante*, 472

Obligation pleaded in bar of a simple contract, 449

A. seised of a rent-charge in fee (the rent being arrear) by indenture of bargain and sale, duly enrolled, granted the said rent and arrears thereof to B. and held the arrears being a thing in action and not grantable over, not yet the rent, for want of consideration, there being no money alledged to be paid, and it cannot be good by way of bargain and sale on the statute, without money, Page 201

BILL of EXCEPTIONS.

The form of a bill of exceptions to the proceedings in the *Common Bench in Ireland*, 404

Error of judgment in C. B. in *Ireland*, in ejectment. The question was upon the bill of exceptions, for that the justices there would not direct the jury, that the probate of a will before the archbishop of *Canterbury*, and also before the bishop of *Fernes*, were sufficient concluding evidence, but only affirmed that they were good evidence, leaving it to the jury. To which the other party shewed in evidence letters of administration under seal of the primate of *Ireland*; whereupon the jury found no such will, and judgment there given for the plaintiff, and error brought here by defendant, and judgment affirmed, 404, 405

A bill of exceptions does not extend where prisoners are indicted at the suit of the king, 486

BY-LAW, vide LONDON.

CAPIAS.

PRINCIPAL MATTERS.

CAPIAS, vide *PROCESS*.

A *CAPIAS* may be the first process in an action of the case, within an inferior jurisdiction, *Pages* 129, 130

Summons doth not lie in an action on the case, but a *Capias* lies in trespass in any case, 129, 130

Summons is not a process in an action on the case, but a *Pone*, *ibid*.

The statute of 19 *Hen. 7. cap. 9.* doth not give the *Capias* alone, but at the common law, where originally there was not summons, but a *Pone*, a *Capias* lay,

130

In all indictments for trespasss, and under treason, a *Venire Facias* is the first process, and not a *Capias*,

375

CERTIORARI.

When one prays a *Certiorari* at a judge's chamber, to remove an indictment out of *London* or *Midlesex*, he ought to give notice of his desire to the other side, three days before, or otherwise the *Certiorari* is not to be granted.

By *Twisden* justice, 74

A *Certiorari* lies into *Wales*, 206

A *Certiorari* was granted to the mayor, jurats and commonalty of the ancient town of *Winchelsea* in *Sussex*, to remove an order or decree made by them, who return (amongst other things) That *Winchelsea* is a member of the Cinque Ports, and that all the said Cinque Ports with their members, by reason of their situation near the sea-shores, as well for the safe keeping the said towns, as of the kingdom of

England, against foreign invasions of enemies, have always and ought to keep beacons, watch-houses, &c. night and day, by sea and land; and for the better maintenance thereof, the said town used to make taxes upon every inhabitant and occupier of house or land lying within the said town, and liberty thereof, which privileges were confirmed by *Magna Charta*. That the 1st of *May* 32 *Car. 2.* they made a tax of 6d. per pound for maintaining the said beacon and watch-houses, and that there was no other order or decree. 1. Resolved, though it is not set forth, That the beacons or watch-houses were in decay, or out of repair, it is well enough; for it would be dangerous to expect till they became in decay. 2. It is to be presumed the inhabitants will not tax themselves unnecessarily, being they all concur in the taxation; and the order was confirmed, *Pages* 448, 449

CHALLENGE.

In an information, the counsel for the king challenged some of the jurors, and the court held, That by the statute of the 33 *Ed. 1.* the king ought to shew cause of his challenge, but not before all the jurors of the panel are called over; for if there be enough besides, no cause shall be shewn of the challenge, 473, 474

No challenge ought to be allowed contrary to the record itself, 485

In an information brought against citizens of the city of *Worcester*, a challenge was taken to the polls,

A T A B L E O F T H E

polls, because the jurors had not any freehold within the said city; and the court held that it was no good challenge, for that the statute of 2 Hen. 5. cap. 3. extends not to this case, for that it is only in causes betwixt party and party, nor doth the statute 35 Hen. 8. cap. 6. reach thereto, but only to sheriffs of counties at large; for if a panel made in corporations must have freehold jurors, they must likewise have six hundredors, which cannot be in any corporation in England; and with them the judges in *C. B.* concurred in opinion, Pages 485,

486

COMMISSIONERS of CHARITABLE USES.

In an avowry, two questions arose; First, Whether the commissioners of charitable uses may add a power of distress where there was none by the original gift? Secondly, If such commissioners in *Cheshire* can bind lands in *Essex*, with such clause. Adjourned, and adjudged for the avowant in both points that they may; *sed Quare*,

209

Where it is said, That if a copyholder devises without surrender to a charitable use, or tenant in tail so devises, that it is good against his issue, it is not intended good by the common law, but to be made good by the decree of the *Chancery*, grounded upon the statute of 43 Eliz. cap. 4. By *Maynard* serjeant,

249

COMMON and COMMONERS.

A commoner cannot without deed

license a stranger to put in his cattle into the common, *P.* 171

COMMON RECOVERY, see ERROR.

It is no error in a common recovery, although it doth not appear that there was not any warrant of attorney for appearance, 70, 96

It is not error in a common recovery because the summons bears teste subsequent to the return of the *Dedimus*, *ibid.*

A *Dedimus Potestatem* is not part of a fine, but a warrant of attorney is part of the recovery, 71

A. tenant for life, the remainder to the use of B. in tail, the remainder to C. in tail, the remainder to the right heirs of D. provided that A. shall have power to make leases for years in possession, reversion, or contingency. A. makes a lease for years, to commence after the death of B. without issue, 236

And held by *Hale* chief justice, That B. may bar this lease by a recovery, although this arise precedent to the estate-tail, because it is in continuance of the estate of B. *ibid.*

A common recovery bars tenant in fee-simple at this day, though there be no tenant of the freehold. By *Maynard*, 323

Recoveries in adversary writs did bar in all cases, till the *Quod ei de forceat* was given by *Westm.* 2. cap. 4. By *Maynard*, 322, 323,

349

Lands are limited to the use of E. L. for his life, the remainder to his first, second, third and fourth sons successively, and the heirs male

PRINCIPAL MATTERS.

male of their respective bodies, and so severally and respectively to every of the heirs male of the body of the said *E. L.* and the heirs male of the body of such heirs male, according to their ages and seniorities, the remainder to *W. L. &c.* *E. L.* suffers a recovery and dies without issue male; and if *E. L.* had an estate-tail, or only an estate for life, was the question. And judgment was given in *B. R.* that *E. L.* had only an estate for life; and on a writ of error brought the judgment was reversed here, and adjudged to be an estate-tail in *E. L.* and so the recovery well suffered by him, Pages 278, 302, 315

CONDITION, vide OBLIGATION.

Lessee for years, upon condition that the lessee shall not assign over his term to any but his kindred without licence from the lessor, the lessor assigns over his reversion, and the lessee assigns over his term and breaks the condition; and if the grantee of the reversion shall take advantage of the condition was the *Quere*, doubted, 250

If lands be given to two upon condition, that they shall not alien, and one releases to the other, it is no breach of the condition, 413, 414

CONSPIRACY, vide TRESPASS.

Before the statute of 33 *Ed. 1. de Conspiratoribus*, an action of conspiracy did not lie for any thing

besides for indicting one for felony and treason; but by this statute it lies for trespass, and against one only, Pages 176, 180

COPYHOLD.

If the fine of a copyholder be uncertain, and the place and time appointed for payment of it is asserted, it seems there ought to be a demand, because it is in point of forfeiture, 42

If there be a real doubt, whether the custom be to pay a fine certain or uncertain, if the tenant deny to pay an uncertain fine, this is not any forfeiture although it be found after that the fine ought to be certain, but then such doubt ought to be real and not covenous, ibid.

If a copyholder surrender his reversion there needs no attornment, 18

A copyholder for life, the remainder for life, (where the custom of the manor is that the person first nominated in the copy may surrender into the hands of the lord according to the custom of the manor, and by such surrender may destroy all the right of him in remainder) the first tenant for life joins in a fine *sur consance de droit, &c.* with the lord of the manor, comprizing the manor and the copyhold; and this was to the use of the copyholder for life; and the question was, If this fine be a surrender within this custom to bar the estate in remainder; and resolved it is not. 1. For that the custom extends only to the copyhold estate, and that cannot pass by the fine. 2. 4

It

A T A B L E O F T H E

It being against the common right, it shall be taken strictly,

Pages 402, 403

A custom within a manor that upon a surrender made to one and his heirs, if the surrenderee comes not in upon the third proclamation, he shall forfeit his estate; if a surrender be made to the use of *A.* for life, the remainder to *B.* in fee, if *A.* comes not in, *B.* shall not forfeit,

404

CORONE, vide TREASON.

J. Manning indicted in *Surry* for murder; on not guilty, the jury at the assizes find, that the said *Manning* found the person killed committing adultery with his wife in the very act, and slung a joint-stool at him, and with the same killed him; and resolved by the court this is but manslaughter, because of the greatness of the provocation,

212

Charging a robber before a justice present is a good taking within 27 *Eliz. cap. 13.* in discharge of the hundred,

221

Two *Frenchmen* were condemned for clipping, and all the justices were of opinion, that the judgment given ought only, *to be drawn and hanged*, contrary to the opinion of *Coke* in his 3d *Institutes*.

234

A. comes into a sempstress's shop, and asked to see two crevats, which she shewed to him, and delivered into his hands, who asked the price of them, she told him 7 *s.* whereupon the said *A.* offered 3 *s.* and immediately ran out of the said shop, and took away the said goods openly

in her sight; and it seemed to the court to be felony, for that his running away with them, explains his intent precedent,

Pages 275, 276

The suing a *replevin* to get the horse of another man's to which he hath no title, is felony, because *in fraudem Legis*

276

So if an officer cometh to a man, and telleth him that he is outlawed, when the officer knoweth the contrary to be true, and by colour thereof taketh his goods, it is felony,

ibid.

One *Farr* was found guilty of felony for taking of goods in an house which he entered by colour of law, and executed,

ibid.

Burning in the hand is part of the judgment in felony,

370

If the principal be attainted of burglary, the accessory must answer, though the principal be pardoned; but if the principal have either his clergy, or be acquitted, or obtain his pardon before judgment, the accessory shall not be questioned,

477

Before *Ed. 3.* an infant could not bring an appeal, but since it is frequent,

483

CORPORATION vide LONDON.

Attachment doth not lie against a corporation,

152

A corporation that hath a patent to make a town-clerk *durante beneplacito* of the mayor and aldermen, may turn him out at their will and pleasure,

188

But an alderman cannot be so turned out.

ibid.

Where

PRINCIPAL MATTERS.

Where time out of mind a corporation had power to remove an alderman for reasonable cause, though they take a new charter, wherein there is no such power given the corporation, yet the same power still remains; for the new charter doth not merge or extinguish any of the ancient privileges, but the corporation may use them as before, *Page* 439

COSTS.

In a writ of error to reverse a common recovery where judgment was affirmed, no costs to be given because no delay of execution, 134, 135

At the common law there was no costs in a writ of error, 135

Costs at the discretion of the court, 38

In an action of trespass *vi & armis* brought for destroying his goods, the plaintiff shall have his ordinary costs though the damages be under 40 *s.* for that the statute of 22 & 23 *Car. 2. cap. 5.* reaches only to such actions in which the freehold may come in debate, 487, 488

COVENANT.

A covenant on payment of a sum to cause a recognizance to be cancelled, and the same to be vacated before such a day, although he do so, yet if he sue execution before, it is a breach, 25, 26

Lessee for years grants to the plaintiff so much of his term as should be to come at the time of his death, and covenanted that he should enjoy it, and gave bond to

perform covenants, and made the defendant his executor, and died, who entered, and ousted the plaintiff; and in debt on this obligation adjudged that the grant was void, and there being no grant, there could be no covenant, and so no bond, *Page* 27

It is agreed that *A.* shall pay *B.* 700 *l.* for the land in *D.* covenant lies against *B.* if he will not convey the land, 183

Lessee for years covenants to repair, *proviso* that the lessor find grand timber, there in an action of covenant the plaintiff ought to aver that he offered grand timber, for they are mutual covenants, 183

On a covenant to make farther assurance, it seems the covenantor is not obliged to make it with covenants, 190

But by *Twissden* Justice, the law is altered since *Cole* and *Kinder's* case, in *Cro. Jac.* as to covenants in a conveyance, if they be reasonable they may be inserted, but not that he is seised of an absolute estate in fee-simple, or the like, 191

A covenant for the true imprisonment of *J. S.* and also to pay chamber-rent, &c. is a covenant for ease and favour, and so within the statute of 8 *Hen. 6.* 222

If lessee for years be distrained by the lord paramount, though he cannot have a writ of mesne, yet he shall have a writ of covenant in lieu thereof, 257

If an agreement be, that the plaintiff from thenceforward shall quietly receive all the tithes of such closes without any interruption or molestation; adjudged a suit

A TABLE OF THE

suit in equity is a breach of his agreement, Page 371

A covenant not to assign a *chose in action* to any person whatsoever, an assignment in equity is a breach of the covenant, for in law no assignment can be of a thing in action, therefore the intent of the covenant must be of such assignment as can be, that is, an assignment in equity admitted, 459, 460, 461

When covenants are joint, and when several, *ibid.*

The defendant (being a brewer) covenants that the plaintiff shall have seven parts of all the grains made in the defendant's brew-house, for seven years then next following, and assigns a breach, that the defendant with intention to deceive the plaintiff, did put divers quantities of hops into the malt, of which the grains were made, by reason whereof the grains were spoiled, and became unprofitable to the plaintiff, and verdict and judgment for the plaintiff, although objected that the grains were delivered according to covenant; and though the defendant had mixed hops, an action of the case lies in that case, and not covenant, 464

If I covenant that I will leave all the timber, which is growing on the land I hire, on the land at the end of the term; if I cut it down, though I leave it on the land, it is a breach of my covenant, *ibid.*

CUSTOM, vide LONDON.

A custom, alledged *in fieri* not *in facto*, is naught, 4

As a custom, that every man may turn his plough upon the next land adjoining, if it is not sown with corn, is naught, without adding the usage, Page 4

A custom found within a manor, that every tenant of the said manor *potuisset sursum reddere*, &c. *ibid.*

So *licet* & *licuit* for the lord to set a pain for the breach of a by-law, adjudged void, 25

A custom within the manor of *Westham* in *Essex*, that the wife shall be endowed of the moiety of all such copyhold lands as her husband was seized of, 58

Unity of possession destroys a custom, 192

If a custom laid in occupiers be good? *ibid.*

That *H.* being seized of the manor of *A.* to which he hath a leet belonging by custom time out of mind, the inhabitants of *D.* used to send a constable to the said leet, and that a leet was held such a day, and notice thereof given at *D.* and they did not send a constable, and that the steward imposed a fine of 39 s. 11 d. on the inhabitants, for which he distrained; held a good custom, 204

But when a duty is raised by custom, a distress for that duty must be maintained by the like custom, and incident to it; *quare. ibid.*

DAMAGES, and INQUIRY of
DAMAGES.

IN detinue, the omission of the value of the charters in the verdict

PRINCIPAL MATTERS.

debt may be supplied by a writ of inquiry, Page 124

In an attachment on a prohibition where damages are given for the plaintiff, there he ought to lay a visne where the suit in the ecclesiastical court was; otherwise the want of a visne hurts not, 387, 388

DEBT.

In debt for rent, the plaintiff demises by indenture a house to a widow, rendering rent, the defendant marries her, the rent is behind during coverture, the wife dies, and the plaintiff brings debt on the indenture against the husband; and adjudged on demurrer, it well lies, 6

A. seised of lands in fee, demises to the defendant for twenty-one years rendering rent during the term, and then grants the rent only (without the reversion) to the plaintiff and his assigns, during the term, and the defendant attorns, and for rent behind the plaintiff brings debt, and on *Nil debet* found for the plaintiff, and moved in arrest of judgment, that debt lies not for want of privity; the court was divided, and no judgment was given, 11, 12

Debt lies for an annuity granted for years, ibid.

Debt lies upon a lease of a fair, and therefore a bishop may grant a fair for years, because debt lies, but not for life, ibid.

By *Wyndham* justice, ibid.

If an annuity be arrear, and the grantee dies, his executors shall have debt, because the person of

the executor was originally charged, Page 11

A feignory in fee is granted for years, the grantee shall not have debt because it is out of a fee, ibid.

But after the term expired he shall have debt. By *Twisden* justice, 11

Debt lieth not against the bail on his recognizance upon a judgment given against the principal, 14

Tenant pur auter vie of tithes in gross, makes a lease for years, rendering rent, and dies, his executors bring debt for the rent, and the defendant demurs to the count; and by the better opinion of the court the action lies not, 18

If the father desires one to find physick for his daughter, debt lies against the father, 67

Debt lies for a fine imposed on one for a contempt committed in a court-leet, 68

Debt lies upon a judgment as well after a writ of error brought, as before, 100

In debt for rent against an assignee, *quare* if he may plead assignment over without pleading notice, 162

Debt is brought on a deed poll, on oyer it was in these words, *it is agreed that A. shall pay to B. 700l. for the lands in D.* and held that debt lies upon it, 183

In debt for rent for six years upon a lease for years the defendant as to the two years pleads *Nil debet*, and as to the other four years he pleads, that before any of the said rent incurred, he assigned over

A T A B L E OF THE

over the said lease and tithes to one *V.* of which the plaintiff had notice, and did receive the rent.

Judgment *fi actio*.

The points were two,

1. When the dean and chapter make a lease of tithes, rendering rent, whether the money reserved be a sum in gross or a rent?

2. Admitting it to be a rent, if the acceptance shall bind as in case of a private person?

The case is not resolved, but as to the second point *Twisden* justice held the acceptance void.

Lessee for life makes a lease for years, lessee for years surrenders to the reversioner, rendering rent; adjudged an action of debt well lies for the rent, because it is a duty by way of contract,

Page 222

Declaration in debt for rent arrears, is good, without shewing the mean assignments, upon a demurrer,

389, 390

In an action of debt *Qui tam*, upon the statute of 23 *Eliz. cap. 1.* for not coming to church, it seems conformity doth not discharge the penalty due,

391, 392

But by the act of 1 *Jac. cap. 4.* the defendant is discharged in such case by his conformity,

466

Debt upon the statute of 23 *Eliz. cap. 1.* for not coming to church, may be brought in this court notwithstanding the statute of 21 *Jac. cap. 4.*

394

An action of debt cannot be commenced before justices of assize,

ibid.

In debt for rent on a lease for years, the defendant pleads, that on *Christmas day* (being the quarter-day) he was at the said messuage

by the space of an hour before sun-rising, until sun-setting of the same day, and that neither the plaintiff nor any other on her behalf came or was ready there to receive it, and that always since the said day hath been, and yet is ready to pay the same: the plaintiff demurs, for that the defendant hath not alledged a tender, but only that he was ready there to pay; but adjudged for the defendant; for tender needs not, but where there is a condition,

Pages 418, 419

DEMURRER, vide PLEADINGS.

If a plea conclude *hoc paratus est verificare*, where it should be *hoc petit quod inquiratur*, it is substance on a general demurrer,

94, 98

Declaration in debt for rent arrear, is good without shewing mean assignments upon a demurrer,

389, 390

DEODAND.

One in ringing was taken up by the bell-rope, and by it was killed, and if the bell was a *Deodand*, was the question; *dubitatur*, 97

A mill-wheel cannot be a *Deodand*, by *Hide* chief justice, *ibid.*

There may be a *Deodand* where the party slain is under the age of discretion. By *Twisden* and *Morton* justices,

208

DEPARTURE, vide PLEADING.

The plaintiff counts upon an indenture of apprenticeship; the defendant

PRINCIPAL MATTERS.

defendant pleads, that at the time of the entering into the said indenture he was an infant: the plaintiff replies, that by the custom of the city of *London*, if one under age binds himself apprentice it shall be good against him; and the doubt on demurrer was, if this be a departure? the court was divided, Page 60

If in covenant the defendant plead performance, and after rejoin that the plaintiff ousted him, it is a departure, 22

If the plaintiff in his replication depart from his count, if the defendant takes issue upon it, and it be found for the plaintiff, the defendant shall take no advantage of that departure, otherwise if he had demurred upon it, 86

If a rejoinder confesses that which was denied in the bar, it is a departure, 94

DEVISE, vide REMAINDER.

A woman having two sons by divers husbands (which were dead) (*viz.*) *Thomas* by the first husband, and *Leonard* by the second, devises the lands in question to *Thomas* for life, and if he die without issue of his body living at the time of his death, then to *L.* in fee; but if *Thomas* have issue living at the time of his death, then the fee shall remain to the right heirs of *Thomas* for ever; the woman died, *Thomas* entered, and suffered a recovery, and dies without issue. 1. And held *Thomas* had an estate but for life only, with a contingent remainder to *Leonard*, which was

barred by the recovery, *Pages 28, 29, 30*

2. A devise to one who is (heir) for life, the remainder in contingency is good, and the descent of the reversion shall not drown his estate for life, *28, 29, 30*

What shall be said an executory devise, and what a contingent remainder, *ibid.*

Executory devises are grounded on the common law, 83

Capite lands were given to the husband and wife, and the heirs of the husband, and the husband being also sole seised of socage lands, devises all his socage lands and dies, living his wife; and resolved it is a good devise for the whole, by three justices, 39, 40

If lands be given to two, and the heirs of one of them, that reversion is not devisable; by *Windham* and *Twifden* justices, 40

If lands be given to two, and the heirs of one of them, and he that hath the fee dieth, no wardship can be, for the survivor remained tenant during life, *ibid.*

Stephen Norton seised in fee of the lands in question, in 1651, made his will in writing, and gave divers legacies, &c. Item, *I give to my brother Anthony Norton 30 l. per annum. Item, I give my lands in Kent and Suffex to one of my cousin Nicholas Amhurst's daughters that shall marry with a Norton within fifteen years; and I make Nicholas Amhurst my executor. Nicholas Amhurst had three daughters, Elizabeth, Anne and Mary; Stephen Norton the defendant marries Elizabeth,*

A T A B L E O F T H E

zabeth, and the lessor of the plaintiff marries the heir at law. And whether the heir at law, or the devisee shall have the lands, was the question? And resolved that the devisee shall have the lands, and that the devise was good notwithstanding the uncertainty, and that although the words are not *who shall first marry with a Norton*, yet the law supplies these words as well in a devise as grant, Page 82

A devise to *A.* for fifteen years, the remainder to the right heirs of *J. D.* is not good; but to *A.* for fifteen years, the remainder to the first son of *J. D.* is good, because the devisor takes notice that he hath not a son, and intends a future act, and the law aids him which was *inops consilii*; by *Bridgman* chief justice, 83

A devise to an infant *in ventre fa mere* for fifteen years, the remainder over is good by way of executory devise, *ibid.*

An estate *in futuro*, and a contingent precedent makes an executory devise, *ibid.*

I give all to my mother, all to my mother; resolved lands do not pass by these words, 97

Sarah the wife seised in fee of a copyhold, surrenders to the use of herself and *R.* her husband, and the heirs of the husband, the husband after surrenders to the use of his will, and by his will devises the land by these words; *my lands in Hackney which were my wife's, and now hers for life, I give to the heirs of the body of my said wife, if that he or they live till fourteen years of age; and for want of such heirs, then to Wil-*

liam Jacob and his heirs. *R.* the devisor dies, *Sarah* his wife survives and marries *H. C.* by whom she had issue the lessor of the plaintiff. *H. C.* suffers a recovery, *Sarah* dies, and the lessor of the plaintiff enters, and the heir of *R.* the devisor enters upon him. *The points were*, 1st, what passes by the will? and on that point the court was divided in opinion. 2^{dly}, what operation the recovery hath? and held the recovery works nothing because copyhold, and a recovery of a copyhold doth not dock the remainder without custom, Pages 162, 163, 164

Where there is a precedent devise, there shall not be a contingent executory devise; by *Wyndham* justice 164

A devise to an infant *in ventre fa mere* if good; *quare.* *ibid.*

A devise to *J. S.* when he marries such a one is good, but no estate vests till marriage; by *Twissden* justice, *ibid.*

The earl of *N.* seised of *Newport-house* in fee, devises the same to his lady for life, the remainder to *A.* his grand-child in tail, provided, and upon condition, that if the said grand-child should marry without the consent of her grand-mother, and the earls of *Warwick* and *Manchester*, and the major part of them, or should die without issue of her body, that then it should remain unto *B.* one other of the devisor's grand-children, and sister to *A.* *A.* marries without consent at her age of fourteen years, and had no notice of the will, 236,

237

1. Resolved

PRINCIPAL MATTERS.

1. Resolved it is a limitation and not a condition. 2. Notice of the condition was not necessary, for that none is appointed by the the devisor to give notice, *Pages*

236, 237

Temple and two others were tenants in common of a manor. *Temple* makes his will in writing of his third part, and after by indenture and fine, partition is made between the tenants in common,

240

And if this partition be a revocation of this will was the question; and it seemed to all the barons it was not any revocation; but judgment was not given, because the plaintiff obtained leave to discontinue, *ibid.*

A man seised of lands held in *Capite*, devises the whole to the corporation of the city of *Norwich*, upon a charitable use; and resolved the devise was only good for two parts, and not for the whole, *249*

Where it is said, that if a copyholder devise to a charitable use without surrender, or tenant in tail so devises, that it is good against the issue; it is not intended good by the common law, but to be made good by the decree of the Chancery grounded upon the statute of 43 *Eliz. cap.*

4. By *Maynard* serjeant, *ibid.*

Hen. W. being seised of lands in fee, devises them to *John Higden* and his heirs during the life of *Robert Durdant*, the remainder to the heirs males of *Robert Durdant* now living; and the question was, Whether *George Durdant*, the only son of the said *Robert*, shall take in remainder, during the life

of his father? And resolved in *B. R.* That the devise vested an estate in remainder to *George* immediately after the death of the devisor, for that the words *heirs male (now living)* was in a will a manifest description of *George*, who then was heir apparent of *Robert*, and known to the devisor to be so, for he was his uncle and godfather; but after error being brought in the Exchequer-chamber, this judgment was reversed,

Pages 330, 331

Note; *This case was after brought into parliament by writ of error, and the judgment in the Exchequer was reversed, and the judgment in B. R. affirmed.* Jones Rep. 99, 100.

The word (*Heir*) in a will may be intended the description of a person, but not when it is in the plural number, *333*

Where an estate is limited to the heirs of the body of the father, it is an estate-tail, *ibid.*

He the 2 *September* 1679, makes his will in writing, and makes *Elizabeth* his wife his executrix, and gives her all the *Residuum* of his estate after some legacies paid, *Elizabeth* dies 5 *September* 1679, in the life-time of the testator, and he having notice of the death of his wife, makes a nuncupative will, dated 6 *September* 1679, and gives to *G. R.* all which he had given to his wife, and died 13 *September* 1679, and the *Quere* was, Whether this nuncupative codicil be allowable since the statute of frauds and perjuries? And resolved by commissioners of delegates, that the nuncupative

A T A B L E O F T H E

cupative codicil is good, for by the death of *Elizabeth* before the testator the devise of the *Residuum* became totally void, and so there was no will *quatenus* as to that part; and so the nuncupative will was *quasi* a new will for so much, and was no alteration of the will as to so much, because there was no such will, its operation being determined,

Page 334

If *A.* be possessed of an estate of 1000*l.* and by his will in writing gives 500*l.* of it to *B.* he may give the residue by a nuncupative will, so as he do not alter the executor,

335

A. P. in Feb. 1649 makes his will in writing, and gives a legacy to his niece in these words, *I do ordain and give to my dear niece Florence Roll, second daughter of my brother Dennis Roll, the sum of 500*l.* which my sister the lady Cholmly hath now in her hands of mine, as by her bond made to me appears.* And makes no executor, and dies in Oct. 69. About ten years before his death, the lady *Cholmly* paid him the 500*l.* And if the legacy is due is the question,

335

And resolved the legacy is due, though the security was altered, *ibid.*

If a man devise a legacy out of debts due in several counties, and the debts are called in before the testator's death, yet the legacy remains good, *ibid.*

The same law, if a legacy be given out of monies at interest, and called in before the testator's death, *ibid.*

But otherwise of a specifick legacy, for that may be lost by being altered, *ibid.*

R. B. being seised of lands in fee, and having issue *Robert* his younger son, who had issue *Robert*, by his will in writing devises his lands to *Robert* his son and his heirs, and gives to his grand-child *Robert* 100*l.* after *Robert* the son dies, and after *R. B.* the father by a codicil in writing devises part of the lands before given to his son *Robert*, by his will to another, and wills that the codicil be annexed and made part of his will, and the same day republishes his will, and then also *Animo Testandi*, by words without writing, declares That his grandchild *Robert* shall take and have by the said will, as his son *Robert* might take and have. The deviser dies, and *Robert* the grandson enters, and the daughters and heirs of *William*, eldest son of *Robert* the grandfather, enter upon him, and lease to the plaintiff. Judgment was given in *C. B.* for the defendant; and error being brought upon this judgment, the judgment was reversed by three justices, *contra Dolben* justice, Pages 408, 409

F. K. being seised of lands in fee, and having issue divers sons and daughters, devises to his third son *Gerard K.* after the decease of his wife, all the lands in question, to him and his heirs for ever, provided always, and upon condition, That his son *Gerard* shall pay unto his daughter *Elizabeth* 100*l.* within six months after his wife's death, and at his age of 21 years, and for default of payment thereof accordingly, he gives the same to his said daughter *Elizabeth*, and her heirs; and farther devises, That if his said

PRINCIPAL MATTERS.

said son *Gerard* happen to die without issue, his daughter *Elizabeth*'s 100*l.* being first paid, then the remainder of his estate to be divided amongst his sons and daughters, and the survivors of them; and the question was, What estate *Gerard K.* took by this will, whether an estate in fee or in tail; and adjudged he had but an estate-tail, 425,

Pages 426, &c.

John Cheek seised of houses and lands in fee, deviseth, That his wife shall have and enjoy the same during her natural life, if she do not marry; but if she do marry, then he wills that his son *Humphrey* shall presently after his mother's marriage enter and enjoy the said premises, to him and the heirs male of his body. In this case two points were stirred, 1st, What estate the testator intended for his wife in this will. 2^{dly}, Whether the remainder to *Humphrey* be a contingent or vested remainder? And adjudged she hath an estate during her widowhood only and no more, and that it was no contingent remainder, but an estate vested in *Humphrey*, to take effect in possession upon the marriage or death of the wife, 427, 428, &c.

A. seised in fee devises all his lands in *M. Langley*, being the land in question; unto his two daughters, *Elizabeth* and *Anne*, and their heirs, equally to be divided betwixt them, and in case they happen to die without issue, then he gives and devises all the said lands to his nephew *F. M.* eldest son of his brother *W. M.* deceased, and to the heirs male of

his body, with divers remainders over. The question was, Whether *Anne* being dead without issue, and *Elizabeth* surviving, the said *F. M.* who was the lessor of the plaintiff, shall have that moiety of the lands, or *Elizabeth* the other sister shall hold it to her and the heirs of her body, by way of remainder by implication; and adjudged that *F. M.* takes nothing upon the death of *Anne*, but that her part remains to her sister *Elizabeth*, by way of a cross remainder, Pages 452, 453, &c.

A devise governed by the intention, whether it be expressed in apt words or not, *ibid.*

DISCONTINUANCE.

An estate is limited to the husband for life, the remainder to the wife for life, the remainder to the heirs of the body of the husband, which he shall beget on the body of his wife, &c. the husband and wife levy a fine, if this be a discontinuance, 36, 37, 38

None can discontinue an estate-tail, unless he discontinue the reversion, and therefore if tenant in tail infeoff the donor, it is no discontinuance of the intail, 344

DISSEISIN.

In an assise between two tenants in common, a forbidding by word of mouth to the tenant to pay his rent, was adjudged a disseisin, 371

Two tenants in special tail recover in an assise, and after one dies
K k without

A T A B L E O F T H E

without issue, and the other being tenant in tail after possibility, is re-disseised, he shall have a redisseisin, because it is the same freehold which he had before, and is part of the estate-tail,

Page 484

DUTCHY.

Reversion of *Dutchy* lands passes by the *Dutchy* seal, without attornment, 90, 91

By the statute 37 *Hen. 8. cap. 16.* Lands lying out of the county palatine shall pass under the *Dutchy* seal, 90

By the common law lands coming to the king in his natural capacity, participate of his prerogative, *ibid.*

The king within age may grant *Dutchy* lands, *ibid.*

Double usurpation doth not put the king out of possession of a church he hath in the right of his *Dutchy*, *ibid.*

An original out of the *Chancery* doth not run in *Wales*, as it doth in a county palatine, 206

EJECTMENT, vide ERROR.

EJECTMENT brought in this court of lands in the county of *Lancaster*, if it lies, the defendant being in custody, 81

In ejectment for 100 acres of bog, and other things, the plaintiff may release his demand to them, and take judgment for the residue, 395

If the heir brings an ejectment, and his ancestor dies subsequent to the action, he shall not recover ;

because every one shall recover only according to the right which he hath at the time of bringing his action, Page 463

ERROR.

Error brought of a judgment in *B. R.* in parliament, and errors assigned, and the parliament dissolved before they were determined ; and held the writ of error is determined by the dissolution of the parliament, 5

In error brought in parliament of a judgment in *B. R.* the transcript only of the record is carried up by the chief justice, and there left, and not the record itself, *ibid.*

But when a judgment of this court is reversed there, the transcript is returned hither, and the record itself is transmitted thither, 5

Error of a judgment in an inferior court, for that the *Venire fac.* is, therefore it is commanded by the court, That he make to come twelve, &c. by whom, &c. and who, &c. in a brief manner, as in the courts at *Westminster*, where it ought to be at large, in all inferior jurisdictions, the exception disallowed, 20, 431

The reason for which nothing out of inferior courts shall be taken by intendment, is, because there they only enter short notes of their proceedings, and when they are to certify, the attornies here draw the records at large. By *Twissden* justice, 21, 431

It is not error in a common recovery, because the summons bears teste subsequent to the return of the *Dedimus*, 70, 96
It

PRINCIPAL MATTERS.

It is not error in a common recovery, although it doth not appear that there was not any warrant of attorney for appearance,

Pages 70, 96

Error of a judgment in an inferior court,

75

Vide jurisdiction.

The plaintiff obtains a judgment against his own ejector, and the party concerned in the land, brings a writ of error in the name of the feigned defendant. The plaintiff pleads to the writ of error, the release of the defendant, and the court held that such release shall not be allowed,

93

And in the said case, the court will not permit the party to proceed to try the issue, if the release be good or not, because it is to bar the right of a third person, *ibid.*

A writ of error to reverse a judgment given in *C. B.* in a writ of partition, upon a *Nihil dicit*, of divers manors, and view of frankpledge, free-warren, and other things of value, and on *In nullo est Erratum* pleaded, divers errors assigned, some in form and others in substance of the proceedings, but not determined,

172

A writ of error lies to *Berwick* or *Calais*,

174

Error of a judgment in the court of *Common Pleas* assigned, That on a *Relicta verificatione* a *Misericordia* was entered, whereas it ought to have been a *Capiatur*,

195

Error to reverse a judgment given in *Bristol*, in an action of debt on obligation. The defendant pleads *Non est factum*, and after

Relicta verificatione confessed, the action and the judgment thereupon was, *Quod defendens sit in Misericordia*, and the error assigned, that it ought to be a *Capiatur*, *Quare*, for it is not resolved,

Page 202

Error of a judgment in *Hexam*, for that the *Venire* is ill awarded, for that it is *Præceptum est per Senescallum Curie prædictæ. quod venire fac. duodecim tum de vicineto de Hexam quam de Vicineto de Fallowfield infra Jurisdictionem, &c. quia nec, &c. Quod sint hic ad horam secundam post meridiem hujus diei,*

218

1. It is not *Per Curiam nec per Senescallum in Curia*, and it may be it was out of court, and process in private jurisdictions shall not be taken by intendment; and of this opinion were two justices, *contra Hale*.
2. The manor of *Fallowfield* is not laid to be within the jurisdiction, as it ought to be in the pleading of the prescription, and the saying in the awarding of the *Venire* that it is so, is not sufficient; to which the whole court agreed.
3. The *Quia nec* for *Qui nec* is not good, but they ought to have put it in at large, and not as it is in *B. R.* and the *Quia nec* is nonsense, and this was allowed for error by two justices, *contra Hale*, but on consideration of the whole judgment was reversed, *ibid.*

Trespass against four in this court, who appeared, and judgment against them, and they bring error here of a judgment given *coram vobis*, and assign for error,

K k 2

That

A T A B L E OF THE

That one of the defendants being an infant appeared by attorney, whereas it ought to have been by guardian, *Et hoc parati sunt verificare, prout Curia consideraverit*, whereas they ought to have concluded to the country; *sed non allocatur*, Page 218

Debt on a bond, judgment was had by default by the plaintiff as executor, and the attorney had left out, *Et proferat hic in Cur. Literas Testamentarias*, but yet the plaintiff was called executor in the count, and the defendant having brought error, it was moved to have the record amended, but denied, 223

When error in fact is well assigned for error, *In nullo est erratum* amounts to a confession of the fact; as if infancy be assigned, the plaintiff cannot plead *In nullo est erratum*, because by it he confesseth the infancy, but he ought to take issue; but if the party assign for error that the court did not sit, or that the defendant did not appear, which assignments are matters of fact, but not well made, there *In nullo est erratum* amounts to a demurrer, 231

Error brought for joining *Assumpsit* and trover in one declaration, 233

Error of a judgment in *Newcastle* in dower, for that it was by plaint there, and the error assigned here was, that freehold is not pleadable without original writ, adjourned, *ibid.*

In debt for 300*l.* the plaintiff obtained judgment by *Nihil dicit* five years ago, and the defendant brings error in *B. R.* and assigns for error no original, and on a *Certiorari* the *Custos Brevium* re-

turns no original; after the plaintiff procures an original, and on enquiry the Master of the Rolls ordered that writ to be set aside. But it was ruled to stand, for that the Master of the Rolls had no authority here, and that if the *Custos Brevium* takes it off the file, he forfeits his office. P. 244

A writ of error lies on the statute of 27 *Eliz. cap. 8.* of a judgment given in *B. R.* in debt on the statute of 1 *Eliz. cap. 3.* &c. for absenting from church, &c. 275

Judgment on an indictment in trespass reversed for error, for that the first process was a *Capias*, whereas in all indictments for trespass and under treason, a *Venire Facias* is the first process, 375

T. & S. & al. were convicted of a riot in the county of *D.* upon the view of two justices of the peace, and the sheriff of the said county, *contra formam Statuti* 13 *Hen. 4. cap. 7.* and fined by the justices, but the sheriff did not join in setting the fine: and on error brought judgment was reversed, for that the sheriff did not join in fining them, 386

In an attachment on a prohibition where damages are given for the plaintiff, if a *Visne* be not laid where the suit in the ecclesiastical court was, it is error, 387, 388

If there be a *Miserecordia* entered against the plaintiff, where part of the verdict that is found for the defendant is surplusage, this is error, 390

In an *Indebitatus Assumpsit* in an inferior court, the court was said to

PRINCIPAL MATTERS.

to be held *coram Majore & Bur-*
gensibus Burgi prædicti. secundum
consuetudinem ejusdem Burgi, &c.
 and the name of the mayor is
 not mentioned, and the judg-
 ment reversed therefore, P. 395

Error brought of a judgment in
 ejectment upon a variance be-
 twixt the verdict and judgment,
 but left undetermined, 398

Error in *Boston* to reverse a judg-
 ment given there upon a *Scire*
fac. grounded upon a recognizance
 for bail; the court there did cer-
 tify not only the judgment upon
 the *Scire fac.* but also the princi-
 pal judgment and all proceedings
 therein, and resolved good enough,

431

Proceedings in inferior courts are
 never entered at large, unless
 when a writ of error is brought,
 and they make up an intire re-
 cord, and not otherwise, 20, 21,

431

A writ of error doth not lie upon a
 conviction upon the statute of 3
Jac. cap. 4. for not coming to
 church, for that it is no judg-
 ment, but the party's remedy;
 if it be erroneous in the Exche-
 quer to quash it there, 433, 434

Error of judgment in the grand
 sessions of *Brecon* in dower, and
 divers errors assigned 459

In a writ of error to reverse a fine
 the defendant cannot plead the
 same fine (now endeavoured to
 be reversed) in bar to the writ of
 error, 461, 462

In trover by five, before verdict
 one of them dies, and they pro-
 ceed to trial, and verdict for the
 plaintiffs, then the plaintiffs sug-
 gest that one of them is dead,
 and pray judgment for the rest,

and had it; and on error brought
 and assigned that the party died
 before verdict, and so a verdict
 given for a dead person; judg-
 ment reversed, Page 463

ESTOPPEL.

One shall not be estopped but of that
 which he may have a traverse,
 458, 459

EVIDENCE, vide TREASON.

The wife cannot be admitted to
 give evidence against her hus-
 band, nor the husband against the
 wife in any case, excepting trea-
 son, 1

One indicted of perjury in the time
 of *Cromwell*, and verdict against
 him, but by the death of *Crom-*
well no judgment is entered, is
 now a good witness, 32

An almanack wherein the father had
 writ the nativity of his son, al-
 lowed as good evidence to prove
 the nonage of the son, 84

In an information of perjury, to
 prove the perjury one was pro-
 duced to what one, since dead,
 swore upon the first trial, and al-
 lowed good evidence, 170

Upon an information on the statute
 of usury, he who borrows the
 money may be a witness after he
 hath paid the money, but not
 before, 191

Depositions taken in *Chancery* in
perpetuam rei memoriam on a bill
 for that purpose exhibited, can-
 not be given in evidence at a tri-
 at law, unless there be an answer
 put in and produced, 335, 336

If a man be convicted of felony,
 and after pardoned, it seems he
 may

A T A B L E O F T H E

may be a good witness, by three justices, Page 369

A man convicted of felony and burned in the hand may be a good witness, for that the burning in the hand is *quasi* a statute pardon, 380

But in the said case if he had not been burned in the hand, a pardon would not have restored him to his credit again, for that in his testimony the people are concerned, and consequently the pardon cannot deprive them of their interest; *Quere, ibid.*

Nothing can be given in evidence against the probate of a will, but forgery of it, or its being obtained by surprise, 405

Though evidence be conclusive, yet the jury may hazard an attaint if they please, ibid.

Wheresoever the same evidence will maintain either an action of trover or trespass, there the recovery and judgment in one of the said actions may be pleaded in bar against the other; *vid. TROVER and BAR.* 472

Wheresoever it may be presumed that any thing must of necessity be given in evidence, the want of mentioning of it in the record will not vitiate it after verdict; *vid. VERDICT.* 487

Why two witnesses are required in treason, *vid. TREASON.* 408

EXCHEQUER.

If goods be condemned by this court, and proclaimed as forfeited, the property is altered, so as no action of trespass or trover will lie by the proprietor against the person that seileth them, 336

The king may dispose of the land itself of a person outlawed by the course of the Exchequer, Page 17

EXECUTION.

One committed to the *Marshalsea*, for divers misdemeanors is taken in execution, he shall not be set at large, 58

When a man is in prison for criminal matters, he is not chargeable with a civil action without leave of the court, 58

But if he happen to be charged, he shall not be discharged. *Fieri non debuit, sed factum valet, ibid.*

EXECUTORS.

Debt lies for fifths against an executor upon the statute of ministers, for it was a duty in the testator, 57

But escape lies not against the executor, for that action is founded *ex delicto,* ibid.

Debt lies for an executor for not setting out of tithes, on the statute of 2 E. 6. ibid.

Executor is not chargeable for a personal tort of the testator, 71, 72

Though the executor be not chargeable for a misfeasance, yet for a non-feasance it seems he is chargeable, ibid.

As non-payment of money levied upon a *Fieri facias*, he is chargeable, 72

Suit in the ecclesiastical court lies against an executor for tithes not paid by the testator. *In Margin.* 72, 95

A. makes his will, and therein makes *G.* and *D.* his executors; *D.* makes

PRINCIPAL MATTERS.

D. makes his will and executors, and dies; *G.* dies intestate, his administrator sues the executors of *D.* for a legacy due from *A.* in the spiritual court, and a prohibition denied, by three justices, *contra Keiling*, Page 123

In an *Indebitatus Assumpsit* by five executors for monies received to the testator's use, the defendant pleads in abatement, that two of the plaintiffs are under the age of seventeen years, the plaintiff demurs, and whether the three that were of full age, and the infants ought to join in this action was the *Quære*; not resolved,

198

In a *Scire facias* brought by *M.* and one other to have execution of a judgment in debt, the plaintiff sets forth in the writ of *Scire facias* that the testator made the plaintiff and another his executors, that the other is under the age of seventeen years, and the defendant demurred on the writ; but resolved the writ was good, and that the infant ought not to join,

198

An executor cannot retain to satisfy a bond to himself against a judgment entered after the testator's death, on a verdict in his lifetime, for that the statute of 17 *Car. 2. cap. 8.* doth supply the death of the defendant so as to make the judgment good against the executor's debt,

210

In a *Scire fac.* on a judgment in debt against an executor, the defendant pleads *pleinment administrator*, and on demurrer had leave given him to mend his plea,

230, 231

In the time of *Glyn* chief justice

this plea was adjudged naught.

In margine, Pages 230, 231

If the testator bind himself to pay money at a day to come, and he dies before, his executor is bound to perform it; otherwise if it be to do a collateral act, as to make a feoffment, or the like, before such a day, and he dies before, the executor is not bound,

415, 416

Where the testator is obliged by bond to pay a sum of money, in an action against his executor, he ought to plead *Uncore prisi*,

416

Though the statute of 21 *Hen. 8. cap. 5.* says that the executor shall bring in a true and perfect inventory, and the executor swear so to do, yet the ordinary, as he may dispense with the time of bringing it in, so he may dispense with the inventory itself upon cause shewn,

470.

As if a legacy be given to *A.* to be paid at three several payments, and the executor pays two of them, and takes releases, and offers to pay the third, and the legatee refuses to accept it, but cites him before the judge in the spiritual court, in such case the ordinary may dispense with the bringing in any inventory at all; for the intention of the statute was for the advantage of legatees and creditors; and here the legacy is tendered, and no creditor complains; *ergo*,

471

An inventory by the said statute is only to consist of goods, chattels, wares and merchandize, and not of things in action,

ibid.

FALS

A TABLE OF THE

FALSE IMPRISONMENT.

THE sheriff not having any writ makes a warrant to arrest *J. S.* and the bailiffs arrest him accordingly, and after a writ is purchased bearing *Teste* before; adjudged false imprisonment lies against the bailiffs; for although a writ shall relate to the *Teste* to maintain justice, yet it shall not relate to excuse and support a wrong; for the time of the purchasing of it may be shewn by special pleading *P. 161*

In trespass of false imprisonment, the defendant justifies by virtue of an arrest in obedience to a precept out of *Warwick* court, returnable *ad proximam Curiam*, and on demurrer it was said the process ought to be returnable on a day certain, and not *ad proximam Curiam*, for so the court being not held, the party may be perpetually imprisoned; but adjourned, 205

In trespass and false imprisonment, the case was, a writ issued out of the court of *C. B.* at the suit of *J. S.* directed to the sheriff of *Norfolk*, who makes his warrant to the bailiff of the liberty of *Alisfum*, who made his warrant to his deputies to arrest the plaintiff; according to the command of the writ the deputies arrest him at *W.* out of the liberty, and after bring him within the liberty, and deliver him to the defendant, gaoler of the said liberty. And the question in *C. B.* was if this action lies against the defendant gaoler, who was not privy or consant of the said wrongful arrest or taking, but

only detained the prisoner, being delivered to him as arrested upon the said writ and warrant. And judgment was given in *C. B.* for the plaintiff; and on a writ of error brought in *B. R.* *Raymond* justice conceived the judgment ought to be affirmed; but the other justices reversed the said judgment, *Pages 421, 422, 467, 468, &c.*

FINES and FORFEITURES.

If a man be convicted upon verdict on an information or indictment, his fine ought to be set in open court, and not privately in the judge's chamber, 68

One *Pain* convicted of perjury on an information at common law, was sentenced to stand on the pillory two days, and to be imprisoned a month without bail or mainprise, and fined 100*l.* 81

One *Farr* was indicted at common law for forging of a warrant of attorney, and found against him, and sentenced to stand twice on the pillory with a paper, and pay 100 marks, and to be imprisoned during the pleasure of the court, *ibid.*

A jury fined for giving their verdict contrary to the direction of the court of the sessions upon an indictment, 98, 138

On an information found against the keeper of the *Gatehouse* prison at *Westminster*, for extortion of fees and hard usage of prisoners; she was fined 100 marks, removed from her office, and the custody of the prison delivered to the sheriff of *Middlesex*, 216

On an information against a captain of

PRINCIPAL MATTERS.

of the foot-guards and his serjeant for rescuing one of his soldiers of his company from the custody of the sheriff of *London*, he confessed the fact, and on that judgment was given against them, the captain was fined 100*l.* and the serjeant 50*l.* and imprisonment till they paid the same, Page 231

Though it be said that fines assessed in court by judgment upon an information cannot be afterwards qualified or mitigated, it is to be meant in another term, and not in the same term. *In margine*, 377

Mr. *Redding* having been convicted (before the justices of *Oyer and Terminer*) for endeavouring to persuade *B.* who was a witness against the noblemen in prison in the *tower*, to forbear his prosecution of them, was adjudged to stand on the pillory and fined 100*l.* and imprisoned for the same, and his gown pulled over his ears, 376, 377

The sheriff ought to join with the justices of peace in setting a fine on rioters by the statute of 13 *Hen. 4. cap. 7.* 386

In an information found against *Blood* and *Christian*, and others, for conspiring to indict the duke of *B.* of buggery, judgment was given that *Christian* should stand in the pillory an hour, and pay 100 marks, and lie in prison till paid, &c. 418

In an information found for spiriting away a boy against *D.* for which he was fined 500*l.* and imprisoned till he paid it, 474

FINES of *LAND*, vide *TAIL* and *ERROR*.

Tenant in tail, the remainder in tail, doth levy a fine, and tenant in tail dies without issue, he in remainder is bound to enter within five years after the death of tenant in tail else he is barred, Page 151

Tenant for ninety-nine years, if he lived so long, levies a fine and dies, he in reversion shall have five years after his death, and the court held there is no difference between the lessee for life and lessee for years, as to this point, contrary to the opinion of the lord *Coke* in *Podger's* case, 219

The issue in tail was barred by a fine by virtue of the statute of 4 *Hen. 7. cap. 24.* before the statute of 32 *Hen. 8. cap. 36.* 359

In a writ of error to reverse a fine the defendant cannot plead the same fine (now endeavoured to be reversed) in bar to the writ of error, 461, 462

Where it is said in *Co. 2 Inst.* that a fine of lands in the *C. B.* in ancient demesne is a bar after five years, it is to be intended of another fine, and not the same which was first levied, 462

In a writ of error brought by a remainder man to reverse a fine levied by tenant in tail, the plaintiff assigns for error, that the tenant in tail after the acknowledgment before the commissioners, and before the return of the writ of covenant, died it is error, 462

FORCIBLE

A TABLE OF THE

FORCIBLE ENTRY, vide INDICTMENT.

Possession without title is a good plea in a forcible entry to bar restitution, although on demurrer,

Pages 84, 85

On an indictment of forcible entry to say he entered as servant, without saying by whose command, is good enough, *ibid.*

In bar to restitution on a forcible entry, the defendant ought to plead, that he was in possession three years before the inquisition found, 85

GAVELKIND.

IF gavelkind land be devisable by custom of gavelkind? 59, 76

Lands disgavelled by act of parliament, yet the custom of devising is not thereby taken away, *ibid.*

Gavelkind may be pleaded generally, otherwise of particular customs, as dower of a moiety, &c.

59, 60

If the king purchase gavelkind land, the custom of the descent is suspended; by *Twissden* justice, 77

GRANTS BY THE KING, vide PATENTS.

The king makes a lease for years, provided on non-payment of the rent, the lease shall be void, the rent is behind, the king cannot grant this term *de novo*, without finding by office that the rent was unpaid at the day, by the statute of 21 *Jac. cap. 25.*

137

The king seised in fee of the manor of *Holbeck* in *Com. Lincoln*, grants

it with appurtenances; and also *omnia fundum, solum, arenas Marescales, & omnes alias terras quæ modo inundat. existunt, & quæ fuerint impofterum recuperat. de mari,* with a *Non obstante* the misrecital, &c. The lands in question were under the salt water at the time of making the patent, and were since recovered from the sea; and the sole *quare* was, if these lands improved and recovered from the sea pass by the said grant? the case was adjourn-
ed,

Pages 241, 242

If the king grant part of the sea, it being parcel of the prerogative, it ought to be expressly named, *ibid.*

Every grant of the king ought to comprehend certainty, and therefore if the king grant his demesnes, that doth not comprehend copyholds, otherwise in case of a common person, 241

If the king grants lands when they shall escheat, it is a void grant, for if it should be good it should be of a freehold to commence *in futuro*, which the law will not permit,

241, 242

If the king grants *bona felonum*, &c. that will not pass the goods of one that stands mute, and will not plead, *ibid.*

If the king grants the amerciaments of his tenants, that will not pass the amerciaments of them by the king as commissioners of sewers,

242

If the king grant to divers persons to be exempt from juries, they shall not be exempt from serving in *B. R.* without express words,

113, 114

All

PRINCIPAL MATTERS.

All Hundreds that were granred in fee by the crown before the time of *Edw. 3.* are joined to the office of the sheriff, *Pages 361, 362, &c.*

In the year 1661, the king grants power to the lord *W.* governor of *Jamaica* to make laws there, who called an assembly, and thereby made laws for raising a public revenue by a tax on strong liquors, towards the upholding the government there, which laws are indefinite and perpetual; afterwards the king grants power to the said lord *Vaughan* to chuse his own council, and with the consent of the major part of them to frame general assemblies of freeholders, according to the usage of other plantations, and with their consent to make laws suitable to those of *England*, which should remain in force for the space of two years and no longer, unless approved by his majesty; the said assembly granted the like revenue of strong liquors, but to continue but two years. The question from hence arose (which was referred by the privy council to the judges,) whether the law made by the assembly in the lord *Vaughan's* time had totally laid aside the law made in the lord *W.'s* time by implication? and it was resolved, that the last council having power to make laws to continue but two years, did not repeal the perpetual law made before, but did only suspend its power during the two years, and no longer, 397
The king within age may grant duchy lands, 90

GRANT.

A prebendary having power to make a commissary, cannot grant this power to his lessee, *Page 88*

None can take a present estate except they be parties to the indenture, but by way of remainder they may, though no parties, 150, 151

If lessee for years grants so much of his term as shall be to come at the time of his death, it is a void grant, 27

If one joint-tenant grant to another, this will amount to a release, 187

If the reversion of a term for years be granted for a valuable consideration, it doth not pass by the statute of uses, for that there is no person to stand seised to the use, 487

HOMINE REPLEGIANDO.

ONE *Designy* a merchant trading to *Jamaica* spirited away the eldest son of one *Turbet*; whereupon his father exhibited an information against him; and on not guilty pleaded, was found guilty, and fined 500 *l.* and to lie in prison till he paid his fine; but the prisoner having the promise of a pardon, and the court having notice of it (it being an offence of a heinous nature) directed the father to bring a *homine replegiando*, and thereupon an *elongatus* was returned, and the prisoner charged with it in prison. 1. And the first question was, whether the prisoner was bailable

A TABLE OF THE

bailable on the *Withernam*? and resolved by all the court, unless the defendant will confess the taking and having the party in custody, he cannot be bailed in that case, Page 474

2. If an *elongatus* returned by the sheriff be conclusive to the defendant, so as he may not traverse it? 1. And they held the defendant, if the return be false, may bring an action upon the case against the sheriff, and if it be found for the plaintiff, the defendant in the *homine replegiando* may be bailed, 474, 475
2. If the sheriff shall die before the issue tried, or the action brought, then the king may issue out a commission to inquire of the truth of the return, which inquisition taken by virtue of the said commission may be traversed by the defendant in the *homine replegiando*; and if the issue of that traverse be found for him, he shall be bailed, 474, 475

A *Capias* in *Withernam* is no execution, *ibid.*

IMPARLANCE.

A PLEA to the jurisdiction cannot be pleaded after imparlance, 34

INDICTMENTS, vide FORCIBLE ENTRY, FINES, FORFEITURES and STATUTES.

Indictment of a forcible entry for entering into a copyhold, and that the defendant *ejecit & disseisavit* the party, quashed, 67
Upon an indictment on the statute

of 2 & 3 *Philip and Mary*, cap. 8. for not contributing to the repair of highways, *contra formam statuti*, resolved, if a man have eight plough-lands he ought to find eight carts for six days, although his land be pasture, P. 186

On a breach of a recognizance for the good behaviour, an indictment lieth not, but a *scire fac.* on the recognizance, 196

An indictment for refusing the oath of allegiance on the statute of 3 *Jac.* cap. 4. 212, 374

An indictment for murder, 212

Upon an indictment for stopping a way, it was declared to be the course of the court, that the offender is to be admitted unto a fine upon his submission before verdict, if there be a certificate that the way is repaired; but if the party be convicted by verdict, such certificate will not serve, but the party ought to cause a *Constat* to issue out to the sheriff, who ought to return, that the way is repaired, because the verdict, which is a record, ought to be answered with matter of record, 215

Indictment for refusing the oath of obedience upon the statute of 3 *Jac.* cap. 4. and judgment thereupon, and a writ of error brought, and divers errors assigned; and judgment reversed for misreciting the oath contained in the act, 373, 374

Indictment against *P.* for entering into the close of one *Crew*, who was found guilty, and judgment, and fined 12*d.* and error assigned, because the process was a *Capias*, whereas in all indictments for trespass

PRINCIPAL MATTERS.

- trespafs and under felony, a *Venire fac.* is the first process; and judgment was reversed, *P.* 375
- Indictment at the quarter-sessions for shooting with a gun, not having lands or tenements, &c. of the annual value of 100*l.* and judgment against him, and error brought thereupon, and judgment reversed, 378
- Indictment against a popish priest on the statute of 27 *Eliz. cap.* 2. and a special verdict thereupon, and judgment for the defendant, 377
- The earl of *Caslemain* indicted for traitterously intending to kill the king, to introduce popery, and to subvert the government, &c. 379
- Indictment for using the trade of a salesman not being apprentice, &c. according to the statute of 5 *Eliz.* and resolved to be a trade within the statute of 5 *Eliz.* 385
- Indictment upon the 3 *Jac. cap.* 4. for not coming to church, with divers exceptions taken to it, 433, 434
- INFORMATION, vide PERJURY, FINES and FORFEITURES.**
- Exceptions to the form of pleading in an information for perjury, 34, 35
- Information against one uttering brass halfpence, 185
- An information upon the stat. of 14 *Car. 2. cap.* 5. against the defendant, being a worsted weaver, for retaining above two apprentices, contrary to the form of that statute, 191
- There is a difference when the information and action is grounded upon an act of parliament, and the conclusion is, *contra formam Statuti præd.* there the information is not good, if the statute be misrecited; but if the conclusion be *contra formam Statuti in hujusmodi casu editi & provis.* there it may be good notwithstanding the misrecital; by *Tewissen* justice, Page 192
- Information, for that the defendant did outrageously make distresses upon his tenants, and was a perturber of the peace, and a common oppressor; held the information is too general, and lies not for distresses, for that they are private offences, 193, 205
- Information against one as common barretor, is good, without other circumstance; but as *oppressor multorum hominum*, without laying whom, is not good, 205
- Information on 12 *Car. 2. cap.* 13. for taking excessive usury, 196
- Vide Usury.*
- Information for writing a scandalous letter, 201
- In an information of perjury at the assizes, it was resolved, that the jury cannot have cognizance of any variance between the record and information, but the judge there ought to determine it, and because the jury had found it specially, it was ordered that a *Venire facias de novo* ought to issue, 202
- Information against the keeper of the prison of the gate-house for extortion of fees, and hard usage of the prisoners in a most barbarous manner, 216
- Information brought in this court against a carrier putting in above five

A T A B L E OF THE

five horses in his waggon, contrary to the stat. of 22 Car. 2. if it lies, *quare*, Page 214
 Information against a captain in the foot-guards and his serjeant, for rescuing one of his soldiers of his company from the custody of the sheriffs of London, 231
 Information for not repairing a certain common stone-bridge, and divers exceptions taken to it, 384
 Information against *Blood* and *Christian*, and others, for conspiring to indict the duke of *B.* of bug-gery, 417
 Information against a merchant for spiriting away a boy, 474
 Information against *Ford*, lord *Grey* and others, for taking away the lady *Henrietta Berkley*, 473

INVENTORY, vide EXECUTORS.

JOINTENANTS, vide JUDGMENT.

Judgment in debt is had against two, the one dies, and the plaintiff brings a *Scire facias* against the survivor, and prays execution against the survivor, which was granted by the court, 26
 If a judgment be had against two, and the one dies, the charge survives, because the plaintiff may take a *Fieri fac.* if he will, and discharge the land, 27
 But if upon this *Scire fac.* the plaintiff takes an *Elegit*, the defendant may have an *Audita querela*, or else suggest this matter on the return of the *Elegit*, and have a *Superfedeas*, *ibid.*
 In judgment against two, if one dies, if the plaintiff will sue ex-

ecution upon the lands by *Elegit*, he ought to charge the survivor and the heir of the deceased jointly, Page 27
 In debt, the defendant pleaded a joint judgment against the testator and one *H.* now alive, and that he had not assets beyond that judgment to satisfy; and adjudged on demurrer for the plaintiff, because the lien survives, and the executor not liable, 153
 If one jointenant grants to another, this will amount to a release, 187
 If lands be given to two upon condition that they shall not alien, and one releases to the other, it is no breach of the condition, 413, 414

ISSUE, vide TRIAL.

The statute of 32 Hen. 8. cap. 30. helps misjoining of issues, 458
 In debt on a bond against *G. Spat* as executor of *J. S.* the defendant pleads it is not his deed, the jury find it is the deed of *Spat*, as the plaintiff declared; and in error the judgment affirmed, because there was an affirmative and a negative, and by the jury's finding the plaintiff had cause of action, 458
 If the bar be good, and the replication naught, and issue be taken upon it, they shall replead to the replication, and the bar remains; and so if the bar be good, and the replication be good, and the rejoinder naught, and issue taken upon it, they shall replead to the rejoinder, and the bar and replication remain; but if the bar is naught, and the replication good, and issue taken upon it,

PRINCIPAL MATTERS.

it, they shall replead for the whole anew, because the bar was naught,

Page 458

JUDGMENT, vide JOIN-TENANTS.

Judgment given by default upon a *Scire fac.* returned against one not subject to the first judgment, shall bind him,

19

If judgment be given against the bail upon two *Nichils*, and no *Capias* is returned against the principal, although the bail cannot reverse the judgment, yet he may have an *Audita querela*, but not on a *Scire fac.* returned,

ibid.

Debt lies upon a judgment as well after a writ of error as before,

100

If issue be taken upon a dilatory, &c. and found against the demandant, final and peremptory judgment shall be given; otherwise it is upon a demurrer, 118,

119

Judgment arrested for the uncertainty of the verdict,

200

Trespals *vi & armis* for taking the *mare ipsius querentis*, *necnon bona & catalla sequent.* viz. and sums them up, but doth not say that they were the goods *ipsius querentis*, and on demurrer resolved, the plaintiff might have judgment for the *mare*, and release the action for the residue,

395

Ejectment for 100 acres of bog and other things; the plaintiff released his demand (to the other things) and took judgment for the residue,

ibid.

JURORS and JURIES, vide CHALLENGE.

Although a jury be charged and sworn in the case of a plea of the crown, yet a juror may be drawn, or the jury dismissed, notwithstanding,

Page 84

A jury fined for giving their verdict, contrary to the directions of the court of the sessions, upon an indictment,

98, 138

If the king grant to divers persons to be exempt from juries, they shall not be exempt from serving in *B. R.* without express words,

113, 114

In case of such exemption, the parties ought to come in person, for the sheriff is not bound to return it,

ibid.

If a man be attainted of felony, and pardoned, he shall not afterwards be sworn upon a jury,

380

JURISDICTION, vide ERROR.

In an *Assumpsit*, the plaintiff declares, That the defendant was indebted to the plaintiff, within the jurisdiction, for nursing a child, and for error alledged, that it is not set forth that the nursing was within the jurisdiction, *Quare*,

75

Particular jurisdictions are not to be supported by implication and intendment,

ibid.

JUSTICES of PEACE.

Upon a *Certiorari* brought to remove an order of sessions into this court, upon opening of it, the court were all of opinion, that

A T A B L E O F T H E

that justices of peace have nothing to do with contracts, and that the order that they had made therein, was void in law,

Page 433

By the statute of 13 Hen. 4. cap. 7. the justices of peace cannot impose a fine upon rioters, without the sheriff join in it, 386

One F. a widow, having several children, and living in the parish of *St. Botolph's without Aldgate*, which parish lies in two counties, viz. *London* and *Middlesex*, put out her children to nurse at *Enfield* in *Middlesex*; then the mother died in that part which lies in *Middlesex*. The nurse applies herself for monies to the parish of *St. Botolph*; and on application to the sessions, the justices ordered, that that part of the parish in *London* should go equal charge with the other, 476, 477

But alter, on application to the judges at the *Old Bailey*, it was ordered, that that part of the parish which lies in *Middlesex* should pay the nurse; for it being made appear, that each part of that parish had distinct officers, and made distinct rates, the court looked on each division as a several parish, *ibid.*

It was also resolved, that no notice can be here taken of the place of the birth of the children, but of their last settlement, because only poor children, and not vagabonds; but those that are rogues and vagabonds by the statute of 3 Eliz. cap. 4. shall be provided for by the place where they were born, 477

L A T I N.

WHERE a latin word is insignificant, it does not vitiate a declaration, otherwise when it signifies another thing, there it is ill, Page 15

LEASE, vide GRANT.

A lease by tenant in tail *in presenti*, without rendering any rent, is not void, but voidable; but it seems, that if the lease be made to commence after his death, that this is a void lease, 132,

133, 134

If tenant in tail make a lease *in presenti*, and after convey over his estate by fine, the conusee in this case cannot avoid this lease; otherwise it seems when the tenant in tail makes a lease to commence at a day to come, there the conusee may avoid it, *ibid.*

If lands be anciently leased by a bishop, and after purchased by a predecessor bishop, for increase of his demesnes, and continues unleased for twenty years and more; if these lands can be now leased again, so as to bind the successor, by the statute of 32 Hen. 8. cap. 28. *quare*, and for that the court was divided no judgment was given, 165, 166, 167, &c.

Lessee for life makes a lease for years, lessee for years surrenders to the reversioner, rendering rent. Resolved it is a good reservation, for that it is a duty by way of contract, 222

In debt for rent on a lease for years, the

PRINCIPAL MATTERS.

the defendant need not to alledge a tender, otherwise where there is a condition, the breach whereof is to be saved thereby, *Pages* 418, 419

LEET.

One presented at the leet for digging cony-boroughs, and breaking the soil in the waste, and moved to quash it, because it is not *ad commune nocumentum*, and the presentment was quashed, for a leet cannot amerce for things to the damage of the lord, 160

A custom in a leet, that the inhabitants of *D.* used to send a constable to the said leet, held good, 204

A man may be amerced in a court leet for not scouring a ditch in a highway, notwithstanding of the statute of 18 *Eliz. cap. 9.* which gives the forfeitures for highways to the surveyors of the highways, 250

In an avowry for an amerciament in a leet, it is not sufficient to say *presentatum fuit* at the leet, that the plaintiff did such an act, but he must aver the thing, and not rely upon the presentment, 337

LEGACY, vide DEVISE.

LONDON, vide MANDAMUS.

A custom that every citizen and freeman of *London* might devise in mortmain, allowed good, 4

A custom that every freeman may take an apprentice, and that infants may bind themselves to serve, &c. good, *ibid.*

Their custom concerning orphans pleaded, 116

If any takes away or eloins an orphan, the court may commit the eloinor to prison till he discovers where the eloinee is, *Page* 116

A by-law, that there shall be but so many cars in *London*, is good, 324, 328

But if such a by-law, that no carman within the city, shall go with his cart without a licence of the guardians of such an hospital, nor without paying a rent to such an hospital for the same, and if any do contrary that then he shall forfeit such a penalty to the said guardians of such hospital, this is a void by-law, *ibid.*

A by-law, that every fellow of the company of *vintners* in *London*, who should be elected into the place and office of one of the livery, should pay 31 *l.* 13 *s.* 4 *d.* is a good by-law; for it is to bind only the members of the corporation; and when a man will agree to be of a company, he doth thereby submit himself to the laws thereof. And it is convenient that the company have such power, to keep up their reputation, and the honour of the city, 446, 447

LIMITATION of ACTIONS.

If words are actionable at the first, the damages after do not give cause of action, and therefore the statute of limitations of two years in such cause is a good bar, 61

But where the words at the time of the speaking are not actionable, but by reason of them the party after loses his preferment, in such case the statute of limitation

L 1 of

A TABLE OF THE

of two years is not any bar im-
plied, Page 61

Adjudged that a debt for damages
clear, is within the statute of
the 21 Jac. of limitations, for
that it rises out of the action,
and is not grounded on the re-
cord. ibid.

MANDAMUS.

LIES to restore one to the
stewardship of a court leet,

Page 12

But whether to a court baron, *du-
bitatur*, ibid.

A *Mandamus* lieth not here to re-
store a fellow of a college where
a special visitor is appointed by
the founder, 31

If a *Mandamus* lieth to restore an
attorney of the town court of
Canterbury, *quare*, for the court
was divided, 56, 57

A *Mandamus* lieth to make an ap-
prentice free after he hath served
his time, 69

If on such *Mandamus* it be returned,
that he obliged himself by his in-
denture of apprenticeship, not to
contract matrimony during his
apprenticeship, and that he with-
in the first two years thereof did
marry, this is only a breach of
covenant, but not any cause to
bar him of his freedom, 92

A *Mandamus* lieth not for one that
hath studied the law seven years
to call him to the bar, for that
there is no person to whom the
writ should be directed, 69

The king gives licence to his queen
to erect a college, *ad studendum*
& *orandum*, and no visitor is ap-
pointed, if there lie any remedy
in this court to redress any griev-

ances arising within the said col-
lege, *dubitatur*, P. 101, 102, 103

A *Mandamus* granted to restore the
recorder of *Barnstable*, directed
to the mayor of the corporation,
who returned *Quod non constat*
nobis, that he was ever elected,
and the return adjudged insuffi-
cient, and restitution awarded,

153

A *Mandamus* lieth not to restore a
town-clerk, for that he is re-
movable at the will and pleasure
of the corporation, 188

A *Mandamus* lies to restore the
Sexton of a parish church, 211

A *Mandamus* lies to the mayor and
aldermen of *London*, to make
them enter up a judgment, 214

A *Mandamus* lies to the judge of the
prerogative, to command him
to prove a will, the will being
not then controverted, but the
suggestion for the *Mandamus* was
brought into court, and read
before the *Mandamus* granted,

235, 236

Returns to *Mandamus*'s ought to be
certain, and not by implication,
because the party ousted hath
not liberty to reply to them,

365

If this court suspect a return to be
false, they can make a corpora-
tion swear the return, 365, 366

A *Mandamus* lies to swear one into
the office of mayor 431

The return to a *Mandamus* ought
to be certain and direct, and not
argumentative only, 431, 432

Upon a *Mandamus* directed to the
mayor, aldermen, bailiffs and
citizens of the city of *Carlisle*, to
restore *H.* to the place and office
of one of the aldermen of the said
city, it was resolved, that where
time

PRINCIPAL MATTERS.

time out of mind a corporation had power to remove an alderman for reasonable cause, though they take a new charter, wherein there is no such power given the corporation to remove an alderman; yet the same power still remains, for that the charter doth not merge or extinguish any of the ancient privileges, but the corporation may use them as before, and such return was held good,

Page 439

There being a dispute between the parson and the parishioners touching the election of churchwardens, the parson claiming to appoint one by virtue of the canon, and the parishioners claiming a custom to chuse both, a *Mandamus* was granted to Sir Thomas *Exton*, commissary to the dean and chapter of *St. Paul's*, to swear *Edward Carpenter*, he being thereto duly elected (who made a special return of the whole matter) because the ecclesiastical courts cannot try the custom of chusing the churchwardens,

439, 440

Taverner having been chosen into the livery of the company of vintners, had a *Mandamus* directed to the master, wardens, and assistants of the said company, to admit him to be a liveryman, according to the said election,

446, 447

Vide London.

NONSUIT.

ON a nonsuit upon a record of a *Nisi Prius* roll varying in substance from the plea roll, a

Distringas de novo was awarded agreeing to the plea roll, Page 38
The plaintiff at the *Nisi Prius* was nonsuit, because the *Nisi Prius* was, that the plaintiff was in such a benefice in the year 1662, whereas the plea roll is 1626, and so the plaintiff destitute of his proof; it was moved to set the nonsuit aside, but adjourned,

73

NUSANCE.

Whether an inmate be a nuisance at common law. *Quere.*

74

OATH of SUPREMACY, vide STATUTES.

BY the statute of 5 *Eliz. cap. 1.* it is enacted, that the lord chancellor or keeper of the great seal of *England* for the time being, shall and may at all times hereafter, by virtue of this act, without any further warrant, make and direct commission or commissions under the great seal of *England*, to any person or persons, giving them or some of them thereby authority to tender the oath of supremacy mentioned in the statute of 1 *Eliz. cap. 1.* to such person and persons, as by the aforesaid commission or commissions the said commissioners shall be authorized to tender the same unto. Whether a commission not directed to any person particularly, nor to tender the said oath to any person by name, be pursuant to the said act? 1st, and it was resolved by three justices

L. 1 2

tices

A T A B L E O F T H E

tices (*Raymond* justice doubting) that this commission was very good, because the power is left to the commissioners to chuse whom they will tender the oath unto, by the clause of the act, and in this manner were the ancient commissions shortly after the statute made, *Pages 444, 445*

2. Though the persons refusing to take the said oath be neither officers nor ministers mentioned in the several statutes of the 1 and 5 *Eliz.* which impowers the lord chancellor to make out commissions; all persons, though not officers, may be offered the said oath, if the commissioners think fit, *ibid.*

By the aforesaid statute of 5 *Eliz.* it is farther enacted, that every person having authority to tender the said oath, shall within forty days after the refusal thereof, if then term-time, if not, then the first day of the next term, certify under his hand and seal, the name, place and degree of the person so refusing, unto the *King's Bench*, in pain of 100 *l.* And the sheriff of the county shall impanel a jury of the same county, to inquire of such refusal, which jury may upon evidence indict the party refusing, &c. 1. If such certificate is directed only to the judges by name, and not to the king in his court of *King's Bench*, as the act requires, be good? and resolved by three justices (*Raymond* justice doubting) that it is good enough, because it shall be intended that the said judges made the court, and were therein sitting at the time of the certificate, *ibid.*

If the indictment sets forth a certificate from the commissioners under their hands, but not under their seals as the statute requires, be good? but in regard the certificate in this case was found *in hac verba*, in the verdict, to be under their seals, the court ordered it to be amended, *P. 444, 445*

O B L I G A T I O N, vide EXE- CUTOR.

Conditions to perform covenants, one of which was, that the defendant was seised of an indefeasible estate in fee-simple; the defendant pleads covenants performed; the plaintiff replies, That he was not seised of an indefeasible estate in fee-simple. The defendant demurs generally, for that the plaintiff, as he supposed, ought to have shewn (he having all his writings) of what estate the defendant was seised; but adjudged the breach well assigned, 14, 15

If in a condition to perform covenants, the defendant pleads performance, and after rejoin, That the plaintiff ousted him, it is a departure, 22

Debt on an obligation conditioned to pay 100 *l.* on the 10th of *January* upon three months warning; the defendant pleads, That the plaintiff had not given three months warning; the plaintiff demurs. It seems that though the obligee omit the warning, the obligor shall be bound to pay it at any three months warning; *per Wyndham*, justice, 61

In debt upon a bond of 14 *l.* the defendant demands oyer of the condition,

PRINCIPAL MATTERS.

condition, which was, That if the defendant pay 2s. a week till 14^l. be paid, and upon default of payment the obligation shall be void; the defendant pleads, That the 17th of October such a year he made default, *Judgment si actio*. The plaintiff demurs; and judgment for the plaintiff, because the condition being senseless, the obligation is single, and in force, Page 68

A condition to resign upon request is good, and not simoniacal, and judgment upon it affirmed in a writ of error, 175

In debt on a bond, the defendant pleads, That the said writing was delivered as an escrow to *W.* a stranger, on condition that if the plaintiff should procure a demise of certain lands to the defendant before such a day, that the said *W.* should deliver the same *ut scriptum suum* to the plaintiff, otherwise not. The defendant pleads, That the plaintiff did not procure the said demise, *Et sic non est factum*; the plaintiff demurs, because he answers not the deed, for *W.* never had authority to deliver his writing *ut factum*, but *ut scriptum suum*, which is not good, 197

Debt on an obligation by the plaintiff as sheriff conditioned for the appearance of *W.* in *B. R. die Sabbati proximo post quindenam Sancti Martini ad respondendum Willielmo Gulston in placito debiti*. The defendant pleads, That the said *Gulston* sued forth a *Latitat return* the same day against the said *W. ad respondendum* the said *Gulston in placito transgressionis ac*

etiam debiti, and pleads the statute of 23 Hen. 6. And on demurrer held it was not the same writ mentioned in the condition, Page 220

A bond or covenant for the true imprisonment of *J. S.* if there be also a clause in it to pay chamber-rent, &c. it is a bond for ease and favour within the statute of 8 Hen. 6. 222

An obligation *flare mandatis Ecclesie*, on excommunication, not good, 226, 227

A bond conditioned to perform a by-law hath been ruled naught, 227

A bond conditioned to seal and execute a release to the plaintiff; the defendant is bound to do it without any tender; for the word *execute* and *seal* comprehends the making, 232

A bond conditioned to permit the plaintiff quietly to take and reap and carry away corn, if the defendant after forbid him to reap, it is a breach of the condition, 371

Where a condition of a bond is in the disjunctive, and one part is impossible, yet the other part ought to be performed, in case it be to be done by a stranger, 373

How interest shall be paid on a bond, 420, 421

If an action be brought upon a bond in *Middlesex*, and the bond itself is dated in *London*, it seems to be ill, for that it cannot be alledged to be made in any other place than where it bears date, 430

If a bond be made to *A.* to the use of *B.* conditioned to pay *B.* money, it is a good plea, that the obligor tendered the money 10

A T A B L E O F T H E

to *B.* because he was in a manner
privy to the obligation, *P.* 484

OFFICE and OFFICER.

Who may go into the office of the
Custos Brevium & Rotulorum in
Banco Regis, 53

PARDON, vide CORONE.

PARDON of murder, &c. shall
not be allowed without a writ
of allowance directed to the
justices, 13

A pardon of killing and felony, &c.
no pardon of murder, *ibid.*

The king cannot pardon the burn-
ing in the hand in an appeal,

370

If the principal be attainted of
burglary, the accessary must an-
swer, though the principal be
pardoned, 477

PARLIAMENT.

Relative words in an act of parlia-
ment will make the thing to pass
as well as if it had been particu-
larly expressed in the act itself,

54, 55

A gift by parliament to the heir of
F. S. who is a person attainted,
is good, and must be intended
such person as might have been
his heir, being only a descrip-
tion of the person implied, 55

One taken by order of parliament
after their prorogation shall be
discharged, 120

Every sessions is a new parliament,
ibid.

Judgment given in parliament may

be executed by the Lord Chan-
cellor, *Page* 120

In all cases of appeals and writs of
error in parliament they continue,
and are to be proceeded on *in*
statu quo as they stood at the dis-
solution of the last parliament,
without beginning *de novo*, 383

The dissolution of a parliament doth
not alter the state of the im-
peachments brought up by the
Commons in a preceding parlia-
ment, 384

PATENT, vide GRANTS by the KING.

A patent may be good in part and
naught in part; so it may be
repealed for part, and stand good
for another part, 177, 178

A patent may be repealed in part,
but that is in clauses independent,
and not in clauses which have a
general influence through the
whole patent, 178, 179

A *Scire Facias* doth not lie to repeal
part of a patent, 156

Void clauses in a patent are to be
tried in an assize at law, and not
by *Scire Facias*, which is the
reason that judgment upon an
issue tried on a *Scire Facias* to
repeal a patent in *B. R.* is not
there given, but the record is to
be returned into this court, which
is not in another case, 178, 179

The entry of the judgment in a
Scire Facias to repeal a patent is,
Literæ Patentis vacentur, and not
part of them, 156

The king cannot have a *Scire Fa-*
cias to repeal a patent, but where
the thing is *in deceptionem Regis*,
or *ad gravamen Populi*, 155

There is a difference betwixt a
Scire

PRINCIPAL MATTERS.

Scire Facias to repeal a patent, and a *Quo Warranto*, for a *Quo warranto* may be good for part, and ill for another part, because the record is not to be touched by it; but in a *Scire Facias* the record is to be cancelled, *P. 156*
Where the king grants two patents of the same thing, the second patentee cannot have a *Scire Facias* against the first, *Quare, ibid.*

PERJURY, vide EVIDENCE.

Exceptions to the form of pleading in an information for perjury,

34, 35

A person convicted of perjury shall not have advantage of the errors in the first record, upon which he was convicted,

74

In an information of perjury, to prove the perjury, one was produced to prove what one, that is since dead, swore upon the first trial, and allowed good evidence,

170

PLEADING.

When the matters to be pleaded tend to infiniteness and multiplicity, whereby the rolls shall be incumbered in the length thereof, the law allows of a general pleading,

8, 9, 10

And therefore in an action upon the statute of sending knights to parliament the election shall be said *per majorem numerum*,

9

In an *Assumpsit* the plaintiff declares that whereas he at the request of the defendant amended such a boat and divers other boats of the defendant, he assumed to pay for his labour and charges *tantum*

quantum, and avers he mended one, and divers other boats, and deserved so much; and adjudged good,

Page 10

Trespass for beating and imprisoning his wife, &c. the defendant justifies by warrant of the sheriff; the plaintiff replies *de injuria sua propria absq; tali causa*, and issue upon it, and verdict for the plaintiff; and moved for a repleader, because *de injuria sua propria* is not a plea to matter of record, but held good enough after verdict,

50

In a *Scire fac.* against the bail upon a writ of error according to the statute of 3 *Jac.* the defendant praysoyer of the condition, and on that he pleads, that the plaintiff prosecuted the writ of error with effect, and that the aforesaid judgment was reversed; *Et hoc paratus est verificare*, where it ought to have been, *prout patet per Recordum*; and the plea was ruled ill,

50

If a plea conclude *Hoc paratus est verificare*, where it ought to have been, *Hoc petit quod inquiretur per patriam*, it is matter of substance on demurrer,

94, 98

In trespass the defendant pleads, That *Hen. 8.* was seised in fee, and so the land descended to the now king, and that he as servant, &c. The plaintiff replies, That *Hen. 8.* granted to the plaintiff, and doth not traverse the dying seised of king *Charles*, and it might come to the king otherwise; and by *Twisden* justice a traverse needs not,

137, 138

In debt for rent of four rooms, the defendant pleads a lease of five rooms, and eviction of the fifth;

it

A T A B L E O F T H E

- it is not good without a traverse,
Page 175
- In trespass on a traverse the plaintiff concludes, *Et hoc paratus est verificare, unde petit Judicium* if the plaintiff *ab actione sua prædicta præcludi debeat*; on this the defendant demurs especially, because he doth not conclude, *Unde petit Judicium & damna sua occasione transgressionis prædictæ sibi adjudicari, &c.* and for this cause the court seemed for the defendant, 182
- Matters that go in defeasance of a deed need not to be alledged in the count, but come more properly on the defendant's part to be pleaded, 65
- Where a matter is expressly pleaded in the affirmative, which is expressly pleaded by the other party in the negative, the next ought to be an issue, and no traverse, for otherwise they will plead *in infinitum*, 199
- Accord, though executed in part, is no good plea to an action of trespass and assault, 203
- In a *Scire Facias* on a judgment in debt against an executor, the defendant pleads *Pleinment administræ* generally, and the plaintiff demurs specially for that cause, if that be a good plea, 230
- And leave given to amend the plea, 231
- In a *Scire Facias* upon a judgment this plea hath been adjudged naught, in the time of *Glyn* chief justice. *In margin. ibid.*
- Ancient demesne is a good plea on the statute of 31 *Hen. 8. cap. 1.* of partition, 249
- A declaration in debt for rent arrear is good without shewing mean assignments upon a demurrer, *Pages 389, 390*
- It is a good plea to an action brought by an attorney for his fees, that the plaintiff did not give the defendant any bill of charges according to the statute of 3 *Jac. cap. 7.* 245
- In debt for rent on a lease for years, the defendant needs not plead a tender, otherwise where there is a condition in the lease, the breach whereof is to be saved, 418, 419
- Though it is frequent to lay a declaration for a debt several ways in an *Assumpsit*, yet it is not a good plea to say, that the several sums are but only for the sum first mentioned, without pleading over, 449

P O W E R S.

- A power to make leases to one, two or three persons, he cannot by that power make a lease for the life of the first son of *J. S.* because the person ought to be *in esse*; by *Wyndham* justice *arguendo*, 163
- The earl of *L. 21 Eliz.* makes a settlement upon himself for life, the remainder upon his issues, the remainder to others, with a power of revocation by indenture subscribed and sealed by himself, to limit new uses. The 26th of *Eliz.* he covenants to levy a fine to other uses, and four years after levies a fine accordingly. And if this indenture and fine make a revocation of the uses in the first deed was the question? And resolved, it was a revocation, because the deed

PRINCIPAL MATTERS.

deed and the fine are but one conveyance, Page 239

Tenant for life, with remainder over, with a power to make a jointure, and the tenant for life covenants to stand seised to the use of his wife for life, for her jointure; resolved a good execution of the power, 239

A power to make leases being general is void, upon a covenant to stand seised, 248

Tenant for life, with a power to make leases to any person, for one, two or three lives, or for twenty-one years, reserving the ancient rent, tenant for life demises to *B.* for twenty-one years to commence after the death of *J.* and *M.* the power is not well executed, being to commence *in futuro*, *ibid.*

A power reserved to *D.* to revoke a deed by writing, subscribed and sealed by him in the presence of two or more credible witnesses, in express words, &c. *D.* makes his will in writing, in the presence of two credible witnesses, without making any express revocation; and adjudged a good revocation, and the will a good execution of the power, 295,

301

PRESCRIPTION.

If a man will prescribe for a toll upon the sea, he ought to alledge a good consideration for it, for that by *Magna Charta*, and other statutes, every one hath liberty to go and come upon the sea, without impediment, 232, 233

In an action upon the case for not grinding at his mill, where one prescribes for mulcture; re-

solved, he must aver that his mill was sufficient to grind all the corn, Page 327

PRIVILEGE.

One being chosen burgess of parliament, and having a trial at bar to be had before the sitting of the parliament, moved to have his privilege allowed, but denied, in regard the parliament were not sitting, nor to sit till after the trial, 12

If one who is in the custody of the marshal may be sued for lands in a county palatine, as well as he may be sued in the Exchequer for lands in a county palatine, or in *Wales*, by *Quo minus*, 81

In an action upon the case for an escape, the defendant pleads the privilege of *eundo & redeundo* from an inferior court against a process *in Banco*, and seemed to the court an ill plea, 100

If a man be arrested in the face of the court, the court hath power to discharge him, but not otherwise, 101

Jurors that will have privilege upon a charter of exemption, ought to claim it in proper person, 113,

114

But shall not have it in *B. R.* nor in case where the king is party, without express words, *ibid.*

The king's servants are privileged from arrests, for that the king shall not be deprived of them without leave, 152

But they may be outlawed, for that it is for the advantage of the king, *ibid.*

An attorney is privileged from serving as reeve, 180

And also from being a soldier, *ibid.*

PRO-

A TABLE OF THE

PROCEDENDO.

On a *Habeas Corpus* a *Procedendo* granted for calling a woman whore in *London*, by three justices, Page 81

PROCESS, vide *CAPIAS*.

A warrant directed to a constable to take *H.* to find sureties for his good behaviour, may be executed on a *Sunday*, notwithstanding the new statute, 250, 251
In all indictments for trespass, and under felony, a *Venire fac.* is the first process, 375

PROHIBITION.

Prohibition lies to the admiralty for suing there for mariners wages, 3
The granting prohibition is not a discretionary act of the court, but *ex debito Jusitia*, 4
No prohibition lies to the admiralty for suing a recognizance there taken by way of stipulation against one that was surety in the nature of bail, 78
Where the freehold, or the power to grant an office may come in question in the spiritual court, a prohibition shall be granted, 88
The plaintiff suggests, that the defendant libelled for defamation in the court of the arches, and that he is an inhabitant in the diocese of *London*, *contra formam Statuti* 23 *Hen. 8. cap. 9.* It was doubted if a prohibition would lie in that case, 91, 92
A prohibition is not *ex gratia*, but *ex debito Jusitia*, 92
A prohibition denied to the spiritual court on suggestion that the executor was sued there for double

damages for not setting out of tithes, Page 95

A. makes his will, and thereby makes *G.* and *D.* his executors, *D.* makes his will and executors, and dies; *G.* dies intestate, his administrator sues the executors of *D.* in the spiritual court for a legacy due from *A.* and a prohibition was denied by three justices *contra Keiling*, 123

A prohibition lies to the spiritual court, because they refused to deliver a copy of articles; and they held that the statute of 2 *Hen. 5. cap. 4.* extends where the proceedings in the ecclesiastical court are *ex officio*, as well as betwixt party and party; and that a prohibition lies for not delivering a copy of a libel in such case, 170

On an *Assumpsit* brought in an inferior court, the defendant tenders a plea there, that the contract upon which the action is brought was made out of the jurisdiction; the court there refused to allow this; and on affidavit here of the said tender and refusal, this court granted a prohibition, 189

A prohibition granted to the court of the marches of *Wales* at *Ludlow*, on suing there for a legacy, contrary to their instructions, 191

Sir *D. M.* knight, was sued in the ecclesiastical court by the name of sir *D. M.* knight and baronet, and pleaded it there, that he is only knight, and not baronet; and the court allowed the plea, and proceeded to excommunication, and a prohibition was granted, 219

A pro-

PRINCIPAL MATTERS.

A prohibition granted to the court of the chamberlain of *Chester*, for that a court of equity cannot charge the inheritance of a man's land with a rent, *P. 221*

The plaintiff had a judgment at law against the defendant, who exhibited his bill in chancery to be relieved against this judgment, and the plaintiff pleaded this judgment, and over-ruled there, and moved for a prohibition, grounding his suggestion on the statute of 4 *Hen. 4. cap. 23. Et adjournatur*, *227*

The plaintiff suggests that there is a custom within the parish of *S.* that the churchwardens with the major part of the parishioners, may order the seats in the church there, and are to see to the repairs of them; and that the churchwardens would have placed the plaintiff in a pew there, and the defendant libelled against him in the spiritual court; the plaintiff prays a prohibition, and denied by three justices, against *Atkins* justice, *246*

Suggestion, that the parishioner is to pay the tenth part of milk at the parsonage-house, or at any other place, is a good ground for a prohibition; by *Popham* justice, *In Margine*, *278*

Prohibition denied upon a libel in the ecclesiastical court for procurations by an archdeacon, *360*

In an attachment on a prohibition where damages are given to the plaintiff, there he ought to lay the visne where the suit in the ecclesiastical court was; otherwise the want of a visne hurts not, *387, 388*

On a libel in the ecclesiastical court

for tithes against *H.* and many others named in a schedule affixed to the said libel, the inhabitants pray a prohibition, and join in a suggestion of a *Modus*; and it appearing that the plaintiff in the ecclesiastical court ought to be prohibited, the *Quere* was, Whether they may have one writ of prohibition, or if they ought to sever? And resolved on examination of the cases, that the parties should bring several writs, for so had been the course of this court formerly, and therefore they would not alter it, although some of the judges of the *C. B.* were of opinion one writ might be granted for all, *P. 425*

The plaintiff sued the defendant in the ecclesiastical court at *York* for marrying his sister's daughter, and the defendant prayed a prohibition, because out of the levitical degrees; but denied by the whole court, because a cause of ecclesiastical consufance, *464, 465*

Though sometimes prohibitions have been granted in causes matrimonial, yet if it were now *res integra*, they would not be granted, *ibid.*

A prohibition granted to the admiralty on suggestion that they had caused his ship to be arrested upon the land, within the body of the county, *Uc.* *489, 496*

RECORD.

NO precedent for the withdrawing a record of the court, though both parties are willing to do it, *69*

A record

A TABLE OF THE

A record dashed through in nature
of a cancellation, Page 69

RELEASE.

If there be two jointenants, and the
one for money grants, bargains,
sells and confirms to the other;
resolved this amounts to a release,

187

A release of damages in dower sus-
tained *occasione detentionis Dotis*,
is no release of the mean profits
of the land, for they are two
distinct things,

366

If by a release of obligations &
scripta obligatoria articles of a
agreement be released,

393

It cannot be construed to be the in-
tent of the party to release an
agreement made to himself, when
he joins another in the same re-
lease, who was not party to the
said agreement,

393

In debt upon an obligation, the de-
fendant pleads a release of all er-
rors, and all actions, suits and
writs of error, whatsoever; and
adjudged the release extended on-
ly to writs of error,

399

Release by one jointenant for life to
another, doth not destroy a con-
tingent remainder depending up-
on it,

413

If land be given to two, upon con-
dition that they shall not alien,
and one releases to the other, it
is no breach of the condition,

413,

414

REMAINDER, vide DEMISE.

A fine was levied of lands to the
use of the husband and wife for
their joint lives, the remainder
to the heirs of the body of the
wife by the husband engendered,
the remainder to the wife (the

surviving) for life, the remainder
to the right heirs of the husband;
the husband dies. And the ques-
tion was, If this estate-tail was
executed in the wife, or contin-
gent? And resolved by all, that
this estate is an estate-tail exe-
cuted in the wife, *sub modo*, not
as to the division of the jointure,
but to other purposes; and no
contingent remainder, *P. 126, 127*

And that it is no more than where
an estate is limited to two, and
the heirs of one of them, *ibid.*

If land be given to a woman during
her widowhood, and after to the
heirs of her body; this is an es-
tate-tail executed, and not con-
tingent,

127

A woman seised of lands in fee by
indenture between her of the one
part, and the lord *P.* of the other
part, did demise the same to the
lord *P.* to have and to hold to him
for forty years, if she lived so
long, in trust, that she might re-
ceive the profits during her life;
and after her decease, then the
one moiety thereof to be and re-
main unto *M. C.* and the other
moiety to *J. B.* and their execu-
tors, &c. for the term of 1000
years; and the question was,
Whether the estate to *M. C.* and
J. B. be good? And it seemed to
the court that the remainder li-
mited to *M. C.* and *J. D.* was
void. 1st, It could not pass to
them by way of present estate,
because they were not parties to
the indenture. 2^{dly}, It could not
be a contingent remainder, being
a remainder for years depending
on an estate for years, and there
cannot be a contingent estate for
years, because a lease for years
operates

PRINCIPAL MATTERS.

operates by way of contract, and therefore the particularestate, and the remainder estate operate as two distinct estates grounded on several contracts, P. 150, 151

But in the said case it was agreed such a remainder may be of a freehold, as an estate for life, the remainder to the right heirs of J. S. is good, 151

A release by one jointenant for life to another doth not destroy a contingent remainder depending upon it, 413

RENT, vide DEBT.

A rent-charge was granted to sir R. B. and his heirs, and in the deed of grant was this clause, *That if the rent be behind, &c. then it shall be lawful for the grantee to enter and retain till he be satisfied.* Resolved, the grantee by virtue of this clause may maintain an ejectment, 137, 138, 158, 159

But in such case after his entry he hath only a pernancy of the profits; he cannot cut down trees, or pull down houses; if he doth, trespass lies against him, as against him who abuses a distress; by *Wyndham* justice, 159

In debt for rent by the assignee of a reversion, the defendant pleads, That before any rent arrear, he had assigned to another; and on demurrer adjudged for the plaintiff, by two justices, *contra Twifden*, 162

In debt for rent of four rooms, the defendant pleads a lease of five rooms, and eviction of the fifth; it is not good without a traverse, 175

Declaration in debt for rent arrear, is good, without shewing the

mean assignments, on a demurrer, Pages 389, 390

In debt for rent on a lease for years, the defendant needs not to alledge a tender; otherwise where there is a condition, the breach whereof is to be saved thereby, 418, 419

REPLEVIN, vide AVOWRY.

In a replevin in the county, the plaintiff doth not declare, and the avowant removes the cause to the *King's Bench*, and the plaintiff is nonsuited without declaring; it seems in that case the defendant may suggest what cattle he took, and shall have a return of them, 33, 34.

The plaintiff in a replevin, since the statute of 21 Hen. 8. cap. 19. may plead, nothing arrear, or any other plea, although he be a stranger, and doth not make any title to the land, 251

At common law a stranger could not plead any thing to the lord's avowry for rents or services, but *Hors de son Fee*, or what did tantamount, 254

He cannot plead tenure by less services, *Rien arriere*, or a release; *ibid.*

But by the statute of 21 Hen. 8. cap. 19. this strictness is discharged; for as the avowant is not tied to avow upon any person, in certain, but upon the land within his seignior; so the tenant of the land by the equity of the statute is allowed to plead any plea to save and discharge his goods from the distress, 255

When the lord avows according to the statute, the plaintiff in the replevin may have every plea that

A TABLE OF THE

that the very tenant might have had, though he be a stranger to the lord, Page 255

Tenant for years is within the statute of 21 Hen. 8. cap. 19. 256

At the common law the tenant might plead any plea in bar to an avowry for a rent-charge, 256

RESERVATION, vide EXCEPTION.

In debt on an obligation against the defendant as heir; the defendant pleads, *Rien per Discent*; and on issue, the jury find, that *W. Armstrong*, the defendant's father, was seised in fee of the manor of *D.* in 1657, and made a feoffment to *B.* and others, of all the said manor, except the two meadows in question, during his life, to the use of the defendant in tail; and whether the two meadows excepted did descend to the defendant, was the question, 207

1. And resolved by all, That the meadows descend to the defendant, ibid.
2. That the exception of the two meadows for his life, was a void exception, because contrary to the rules of law, to have a livery operate *in futuro*; otherwise perhaps it had been if the exception had been for years only, ibid.
3. Though it be void, yet it doth amount to an indication of the intent of the feoffor, that the same should not be according to the limitation of the other lands, ibid.

As a lease of a house with the lands thereto appertaining, though lands cannot properly belong to a house, yet it declares the intent of the party that it should pass,

and so is as much as therewith enjoyed or used, Page 207

The plaintiff's ancestor, (whose heir the plaintiff is) seised in fee, demises to the defendant, rendering rent to the lessor, his executors, administrators and assigns, during the term; and the plaintiff declares as heir; the defendant demurs in law; and adjudged for the plaintiff; for though the reservation be but to the lessor and his executors, &c. yet it being (during the term) it shall run with the reversion, 213

Lessee for life makes a lease for years, which lessee for years surrenders to the reversioner, rendering rent; adjudged a good reservation, because it is a duty by way of contract, 222

RESTITUTION.

No restitution for goods taken upon an erroneous execution, for which damages had been already recovered in an action of trespass, 74

Restitution is of duty, but restitution is of grace, 85

RETURN, vide SHERIFF.

RIOT.

By the statute of 13 Hen. 4. cap. 7. the sheriff is to join with the justices of peace in setting the fines on the rioters, otherwise it is error, 386

STATUTES.

WESTM. 2. cap. 46. The cutting down of timber trees by unknown persons *noctanter*, is not within this statute, 487

33 Edw.

PRINCIPAL MATTERS.

- 33 *Edw. 1. de conspiratoribus.* Before this statute an action of conspiracy did not lie for any thing besides for indicting for felony and treason; but by this statute it lies for trespasss, and against one only, *Pages 176, 180*
- 4 *Hen. 4. cap. 23.* If a prohibition lie into the court of *Chancery* on this statute, 227
- 13 *Hen. 4. cap. 7.* In a riot the sheriff is to join with the justices in fining the rioters, or else it is error, 386
- 2 *Hen. 5. cap. 3.* Extends where the proceedings in the ecclesiastical courts are *ex officio*, as well as between party and party, 170
- 2 *Hen. 5. cap. 3.* extends only to causes between party and party, 486
- 23 *Hen. 6.* A covenant for the true imprisonment of *J. S.* and also to pay chamber-rent, is a covenant for ease and favour within this statute, 222
- 23 *Hen. 6. cap. 10.* If a serjeant at arms be within this statute, 62
- 1 *Ric. 3. cap. 3.* Trespass lies for seizing the goods of a felon before conviction, 414
- 4 *Hen. 7. cap. 24.* An estate-tail was barred by a fine, by virtue of this statute, and before the statute of 32 *Hen. 8.* 359
- 19 *Hen. 7. cap. 9.* expounded, touching *Capias's*, 129
- 21 *Hen. 8.* Of administrations, it is in the power of the ordinary to grant administration to the wife or next of kin, 93
- 21 *Hen. cap. 5.* Of inventories, when the judge may dispense with bringing in an inventory, when not, 470, 471
- 23 *Hen. 8. cap. 9.* touching citations out of the diocese, *Pages 91, 92*
- 26 *Hen. 8. cap. 3.* Of first-fruits and tenths, 312, 313
- 31 *Hen. 8. cap. 1.* Of partition, ancient demesne is a good plea, 249
- 32 *Hen. 8. cap. 28.* What shall be said lands leased by a bishop for twenty years last past, 165, 166
- 31 *Hen. 8. cap. 24.* Lands parcel of the possessions of the prior of *St. John of Jerusalem*, that came to the crown by this statute, are discharged of tithes, 225
- 32 *Hen. 8. cap. 30.* helps misjoining issues, 358
- 34 *Hen. 8. cap. 20.* An estate-tail cannot be barred where the reversion is in the crown, 358
- 35 *Hen. 8. cap. 16.* reaches not to cities and corporations, 486
- 37 *Hen. 8. cap. 16.* Lands lying out of the county palatine of *Lancaster*, will pass under the duchy seal, 90
- 2 *Edw. 6.* Of tithes. In debt on the statute, it was held by the court, that a verbal agreement to pay money to the parson in discharge of tithes, though it is not such an agreement which may pass the right; yet it is a good agreement within this statute, to bar the plaintiff of his action, 14
- 22 & 23 *Car. 2. cap. 5.* extends not to trespasss of goods, 487, 488
- 29 *Car. 2.* Whether molasses be an imported material within this statute, 305, 306, 307
- 9 *Car. 2.* Of frauds and perjuries, 334, 450, 451

CONCERNING

A TABLE OF THE

CONCERNING STATUTES IN GENERAL.

Although an act of parliament be a private act, yet the judges are to take notice judicially of all parliaments and their sessions,

Page 191

Misrecital of a statute vitiates the count, ibid.

There is a difference when the action or information is grounded on an act of parliament, and the conclusion is *contra formam Statuti predicti*. there the action of information is not good, if the statute be mis-recited; but if the conclusion be *contra formam Statuti in hujusmodi casu editi* & *provisi*, there it may be good, notwithstanding the misrecital; *per Twifden justice*, 192

Where a statute gives a remedy for any thing, it shall be presumed there was no remedy before at the common law. *In Margin*.

260

General words in an act of parliament do not comprehend an estate-tail, 322

Rules to construe acts of parliament are different from the strict rules of common law, 355, 356

Relative words in an act of parliament will make a thing to pass as well as if it had been particularly expressed in the act itself,

54, 55

SHERIFF.

A sheriff ought not to return privilege to be exempted from juries, but ought to summon them, and shall not be liable to an action for not returning them privileged, 113, 114

The sheriff returns a rescous against S. and others, and the return is, that A. being in custody of my bailiffs, the defendant rescued him out of the custody of the bailiffs, and qualshed, because it ought to be out of the custody of the sheriff, Page 161

Upon a judgment in this court, a *fieri fac.* issued out; and upon a *Nulla bona* returned in London, the plaintiff takes out a *Testatum fieri fac.* directed to the sheriff of Montgomery to levy the monies in the hands of the defendant executor: the sheriff returns, that this is a county in Wales, and that *Breve Domini Regis non currit in Wallia*; adjudged an ill return, by three justices, 206

All hundreds that were not granted in fee by the crown before the time of Ed. 3. are joined to the office of the sheriff, 361, 362, &c.

TAIL, vide FINE.

A LEASE made by tenant in tail without rendering any rent is not void, and if after he convey over his estate by fine, the conusee in this case cannot avoid this lease, otherwise it seems when the tenant in tail makes a lease to commence at a day to come, there the conusee may avoid it, 132, 133, &c.

If tenant in tail, where the reversion is in the crown, be disseised, and the disseisor levy a fine, and five years pass, his issue shall be bound, 273

If a man purchase an estate tail from the crown, a fine will bar his

PRINCIPAL MATTERS.

his issues, notwithstanding the statute of 34 Hen. 8. Page 274
None can discontinue an estate-tail, unless he discontinue the reversion, and therefore if tenant in tail infeof the donor, it is no discontinuance of the intail, 344
An estate-tail cannot be docked neither by fine or recovery, where the lands are of the gift of the king, and the reversion is in the crown, 359

But if such reversion be granted out of the crown, it may be destroyed by fine and recovery, 288,

358
The issue in tail was barred by a fine by virtue of the statute of 4 Hen. 7. cap. 24. before the statute of 32 Hen. 8. cap. 36. 359

A feoffment to the use of A. and his issues male of his body is no estate-tail in A. 317

TENANTS IN COMMON.

Action of the case lieth not for one tenant in common on a fraudulent sale of all, by the other, 15

Tenants in common may join in an action of covenant for not repairing of an house, &c. 80

If two tenants in common make a lease for years rendering rent, and then one of them dies, the executor and survivor may join in debt, or sever at their pleasure, *ibid.*

But if the lease be for life they ought to sever, *ibid.*

They may join in waste in the Tenuit, and in Detinue for deeds, *ibid.*

Tenants in common may join in an action upon the case for obstructing a water-course. In Margin *ibid.*

In a writ of partition betwixt tenants in common by the statute of 31 Hen. 8. cap. 1. Page 80

In an assize between two tenants in common, a forbidding by word of mouth to the tenant to pay his rent, was adjudged a disseisin, 371

TENANT at WILL.

A. makes a lease at will; and then leases to another for years, to commence presently, on condition that the second lessee enter not till the rent at will is due: resolved, that the lease or agreement did so determine the will, as the action lies not against tenant at will for the rent, 224

TRAVERSE, vide PLEADING.

Where a matter is expressly pleaded in the affirmative, which is expressly pleaded by the other party in the negative, the next ought to be an issue, and no traverse; for otherwise they will plead *in infinitum*, 199

In trespass on a traverse the plaintiff concludes, *Et hoc paratus est verificare, unde petit Judicium*, if the plaintiff *ab actione sua predicta præcludi debeat*; on this the defendant demurs specially because he doth not conclude *Unde petit Judicium & dampna sua occasione transgressionis predictæ sibi adjudicari, &c.* For this cause the court seemed for the defendant, 182

In debt for rent of four rooms, the defendant pleads a lease of five rooms, and eviction of the fifth, it is not good without a traverse, 173

The probate of a will is not traversable, 406, 407

M m TREASON,

A T A B L E OF THE

- TREASON** vide **CORONE**.
 Before the statute of 26 Hen. 8. no estate tail was ever forfeited for treason, Pages 346, 348
 When a prisoner is charged with the offence of killing the king, and the evidence is, that he at several times laboured it, and by several ways; and to each particular time and fact there is but one witness, and yet every of the said facts conduces directly to the effecting and perpetration of the fact and treason charged upon the prisoner; such evidence is sufficient within the statute; but otherwise it had been if the facts had been tending to another several treason, 407
 Why two witnesses are required in treason, 408
 The ceremony for the prisoner of holding up his hand at the bar upon an arraignment of treason is only for the making known the person of the offender to the court; for if he answers that he is the same person, it is all one, 408
 What trusts are forfeited for treason, 120, 121, 122, &c.
 The king by the attainder shall have the same estate in law as the party had in equity, and no more; and therefore if a trust be to A. for life, the remainder to B. and B. is attainted, the king shall have only the remainder and not the possession, 122
 For the statute of attainder is like to the statute of uses, it executes trusts, 122
 The father by attainder shall not forfeit a mortgage redeemed by the son, for that the son hath it as a purchaser, *ibid.*
- An indictment of high treason may be tried by *Nisi prius*, vide *trial*, Page 367
 A *Tales de circumstantibus* may be awarded in case of treason, by the statute of 4 & 5 Phil. & Mar. cap. 7. where the king is party, 367
TRESPASS vide **TROVER**.
 Trespass for taking his goods (*inter al.*) *unam Sataginem*, Anglice a *frying pan*; on intire damages given, it being moved in arrest that *Satago* was no latin word, and signifies nothing, but it ought to be *Sartago*; but adjudged for the plaintiff, for if it signify nothing, no damages are given for it, 15
 Trespass *vi & armis quare Phasianos suos & Perdices suas capit*, held good by the court after a verdict, 16
 After a rule of court to vacate judgment, trespass lieth against him that took the goods in execution, 73
 Trespass for taking 40 sheep, and chasing of them, by reason of which chasing one of them died; the defendant pleads, that the place in which the chasing is supposed, was his freehold, and that he *leniter* chased them, *quæ est eadem transgressio*. The plaintiff replies, and justifies for common. Defendant rejoins by inclosure; the plaintiff demurs; and held, the bar was good without a traverse, 185
 Accord, though executed in Part, is no good plea to an act of trespass and assault, 203
 Trespass *quare clausum fregit pedibus ambulando & prostrernere ses fences continuando*

PRINCIPAL MATTERS.

continuando transgression. præd from such a day to such a day, *ad damnum*, &c. after verdict moved in arrest of judgment, that there can be no *Continuand.* in breaking fences; and adjourned, Page 228, 396

If I bring an action of trespass for taking my horse, and using him twenty days, it seems I cannot lay it with a *Continuando*, 228.

Trespass *vi & armis*, the plaintiff counts that the defendant 14 April 30 Car. 2. did thrust a woman named *M. Hunt*, upon his son named *H. Hunt* being an infant under the age of discretion, by means whereof his thigh-bone was broke, and the plaintiff enforced to expend great labour, and divers sums of money to cure him, *ad damnum*, &c. and verdict and judgment for the plaintiff; by *Mountague* chief baron, and *Atkins* baron, *contra Raymond* baron, who held the son ought to bring the action, and not the father, 259, 260

The father cannot have an action of trespass for beating his son, if it be not laid *per quod servitium amisit*. By *Raymond* baron, 259

A father shall not have an action for the loss of the marriage of his son and heir, except when a stranger takes him by force and marries him; but if the son marries himself, or a stranger procures him to marry one, the father hath no remedy. By baron *Raymond*, 259, 260

Trespass *vi & armis* for taking the mare *ipſius querentis* necnon *bona & catalla sequent.* and sums them up, but doth not say that they were the goods *ipſius querentis*;

and on demurrer it was held, the plaintiff may have judgment for the mare, and release the action for the residue, ige 395

Trespass *quare domum suam fregit* 1 Maii *continuando* till 1 June, is not good, but for feeding the grass it is good, 396

Trespass for throwing logs into the plaintiff's close, with a *Continuando*, is not good, but if *diversis diebus & vicibus* were in, it would be good, *ibid.*

Trespass *quare clausum fregit pedibus ambulando & prosterne ſes fences continuando* from such a day to such a day, seems not good after verdict, *ibid.*

Trespass for spoiling corn in the blade may be with a *Continuando diversis diebus & temporibus* for two years, *ibid.*

A demurrer to an action of trespass with several continuances for that the several continuances of the trespasses are several trespasses by themselves, and ought not to be declared upon with a *Continuando*; but left undetermined, 396

Trespass lies upon the statute of 1 Ric. cap. 3. for taking the plaintiff's goods, (being arrested for suspicion of felony) before conviction; and resolved, money is goods within that statute, 414

If a man have my goods by my delivery, and I afterwards demand them, and he refuses to deliver them, an action of trespass, *vi & armis* doth not lie, because here was no tortious taking; but in such case trover well lies, 472

When there is a tortious taking of goods and detaining them, the party may either have trover or trespass at his pleasure, and in

A TABLE OF THE

such case judgment in one of the said actions is a bar in the other,

Page 472

Wheresoever the same evidence will maintain both the said actions, there the recovery and judgment in one may be pleaded in bar against the other, otherwise not, *ibid.*

The statute of 22 & 23 Car. 2. cap. 5. extends not to trespass of goods, 487, 488

TROVER and **CONVERSION**,
Vide **BAR**.

Trover for two pair of pothooks, and divers other things, and also for hangers, held naught after verdict, because of the uncertainty of the word *hangers*, 2

Otherwise it had been brought for the pothooks and hangers only, admit, *ibid.*

Trover lies for a billiard-table, ports, flicks and balls, *ibid.*

Trover and trespass are actions sometimes of a different nature, for trover will sometime lie where trespass *vi & armis* will not; as if a man have my goods by delivery to keep for me, and I afterwards demand them, and he refuses to deliver them, I may have an action of trover, but not trespass *vi & armis*, because here was no tortious taking, 472

Sometimes the case may be such, that either the one or the other will lie, as where there is a tortious taking of goods and detaining them, the party may have either trover or trespass, and in such case judgment in one action is a bar in the other, 472

Wheresoever the same evidence

will maintain both the said actions, there the recovery and judgment in one may be pleaded in bar against the other, otherwise not, Page 472

In trover by five, and before verdict one of them dies, and they proceeded to trial, and verdict for the plaintiffs, then the plaintiffs suggest that one of them is dead, and pray judgment for the rest, and had it; and on error brought and assigned, that the party died before verdict, and so verdict given for a dead person, judgment was reversed, for the same right continues, which was at the bringing the action, 63
And though in the said case the plaintiffs were joint-tenants, and had a capacity of having the whole survive, yet in truth every one had but a moiety, and so they were not at the time of the action intitled to so much as they are after the death of one of the plaintiffs, *ibid.*

TRIAL and **MISTRIAL**.

Covenant brought in one county, and the breach assigned for not repairing a house in another county, and the trial had in the first county; if it is a mistrial, the court was divided, 85, 86

In cases of trials concerning things arising in *Berwick*, the use is, to suggest upon the roll that the king's writ doth not run in *Berwick*, and pray a *Venire* may be of the next vill to *Berwick*, which is *Belfort*; and upon this a *Venire* is directed to the sheriff of *Northumberland* to make come twelve out of *Belfort* to try this issue by *Nisi prius*; and this is a good trial, 173, 174

In

PRINCIPAL MATTERS.

- In debt upon an obligation conditioned to pay money in *Berwick*, was tried at *Belfort*, Pages 173, 174
- A thing done in *Wales* shall at common law be tried in the next county adjoining, 173, 174
- A thing in *Ireland* was tried in the county of *Salop*, which is alledged to be the next county to *Ireland*, 174
- A mistrial aided by the statute of 16 & 17 Car. 2. cap. 8. 181
- An indictment of high treason may be tried by *Nisi prius*, 367
- A *Tales de circumstantibus* may be awarded in case of treason, by the statute of 4 & 5 Phil. & Mar. cap. 7. where the king is party, 367
- A trial by consent may be had in a foreign county where such consent is entered upon record, otherwise not, 372
- If the issue be, No Knight, it shall be tried by the country, and not by the king at arms, 379
- In a *Quare Impedit* the defendant pleads, That the plaintiff *puis le darrein continuance* was knighted, and the plaintiff denies it, and issue thereupon, and tried *per patriam*, *ibid.*
- Seisin of lands in *Kent* is tried in *London*, and it seemed to the court well enough after a verdict, by the statute of 16 & 17 Car. 2. cap. 8. 392
- Trial on a bond is to be where it is dated, 430
- Nonage may be tried where the party was commorant, and not where the writ was brought, if collateral to the action, 458
- TITHES, vide PROHIBITION.
- Moved for a prohibition on suggestion, that the executors were sued in the spiritual court for double damages for not setting out of tithes; but denied, P. 95
- Lands parcel of the possession of the prior of *St. John of Jerusalem* that came to the crown by the statute of 32 Hen. 8. cap. 24. are discharged from payment of tithes, 225
- On a bill in the Exchequer for small tithes by a vicar, a question arose, Whether a parishioner shall pay the tenth part of the milk of his cows every meal, or only every tenth meal; and decreed he shall pay every tenth meal only, 277
- And that the tithe milk ought to be carried by the parishioners and delivered at the vicarage-house; by *Raymond* baron, 278
- But the chief baron and the other two barons agreed that it should be delivered in the church-porch, because the neighbouring parish-
es did so, *ibid.*
- Suggestion that the parishioner is to pay the tenth part of milk at the parsonage-house, or any other place, is a good ground for a prohibition; by *Popham* chief justice. *In Margin.* *ibid.*
- Tender of tithe cheese at the house of the parishioner, is a good tender. *In Margin.* *ibid.*
- In debt on 2 Edw. 6. for tithes, it was held by the court that a verbal agreement to pay money to the parson in discharge of tithes, though it is not such an agreement which may pass the right, yet it is a good agreement within the statute to bar the plaintiff of his action of debt, 14

VARIANCE.

A TABLE OF THE

VARIANCE.

IN an information of perjury tried at the assizes, it was resolved by the court, that the jury there cannot have consance of any variance between the record and the information, but the judge there ought to determine it; and because the jury had found it specially, it was ordered that a *Venire de novo* ought to issue, 202
Variance betwixt the verdict and judgment in ejectment assigned for error but not determined, 398

VENIRE FACIAS.

In debt upon an obligation conditioned to pay money at the house of one *Tarrow* in *Wood-street magna, London*; the defendant pleads, that he paid the money at the said house in *Wood-street*, but names no parish; on that a *Venire* issues to the parish of *St. Michael Wood-street*, and found for the plaintiff, and judgment. The defendant brings error, and assigns for error, That the parish of *St. Michael* is not named in any part of the record; but ruled good, being after verdict, 67.

And by *Twisden* justice, The words of the statute of 21 *Jac. cap. 13.* by reason the *Visne* is sued out of more places, or of fewer places than it ought to be, so as one place be right named, are to be intended, when some of the places are named in the record, 67

And therefore if an action be laid in *D.* and a *Venire fac.* issues *de Corpore Comitatus*, there, altho' the *Venire* be awarded to more places, yet it is not good; be-

cause the body of the county was not named before in the record, *ib.*

At a trial at the *Nisi prius*, the plaintiff changed the *Venire fac.* and panels, and had a jury the defendant knew not of; and held, that the defendant cannot be aided, if the first *Venire* was not filed, 76

And a difference taken when the first *Venire* was not filed, there he cannot be aided, because the defendant may have resort to the sheriff, and have a view of the panel, to be prepared for his challenges; but if the first *Venire* was filed, then the defendant shall have a new trial; by *Twisden* justice, and all the clerks, *ib.*

Judgment stayed for want of *Visne*, 178

In an attachment on a prohibition where damages are given for the plaintiff, there he ought to lay a *visne*, where the suit in the ecclesiastical court was, otherwise the want of a *Visne* hurts not, 387, 388

Probos & legales homines in a *Venire* are of the same import as *Liberos & legales hominos*; adjudged, 417

If since the expiration of the statute 16 & 17 *Car. 2. cap. 3.* The *Venire* be *Quorum quilibet* may expend 20*l.* in lands. And resolved by three justices, *contra Raymond* justice, That the writ was good, for that before any statute it was, and now is in the power of the court to award a *Venire fac.* of what large sum they please, 417, 418

VENUE, vide VENIRE FACIAS.

An action on the case for forging a will brought in *Middlesex*, but the land comprised in it lay in *Sussex*, *folk*,

PRINCIPAL MATTERS.

folk, and the Venue on motion changed to Suffolk, Page 33

VERDICT.

No privy verdict can be given in criminal causes which concern life, as felony, &c. because the jury are commanded to look upon the prisoner when they give their verdict, and so the prisoner is to be there present at the same time, 193

But in criminal cases, where the defendant is not to be personally present at the time of the verdict, a privy verdict may be given, *ib.*

An information was brought and laid in *Devonshire*, and the trial there, and yet the jury gave a privy verdict in the county of the city of *Exeter*, which was held good by the court, because the custom hath always been to give the verdict in that place, *ibid.*

Although the commissioners have sole authority to adjudge a man a bankrupt, yet in an action the jury must find whether he was a bankrupt or no, 337

Wheresoever it may be presumed that any thing must of necessity be given in evidence, the want of mentioning it in the record, will not vitiate it after a verdict, 487

Want of attornment is aided after a verdict, *ibid.*

USES.

An use shall not be raised by covenant to stand seised, &c. when the parties intended it to another purpose, 43, 44, 45, &c.

The father in consideration of affection, gave lands to his son, and livery was indorsed on the deed,

but not made; and adjudged an use did arise to the son; and a difference taken where the father by feoffment gives to a stranger, to the use of his son, there no use arises; but when the conveyance is to the party himself, where the use will arise, 49
The father covenants to stand seised to the use of the heirs of his body by a second wife, he having a son by the first; adjudged that the father took an estate for life, by implication, and that it was the same in effect, as if he had covenanted to stand seised to the use of himself for life, by express words, and the heirs of his body by a second wife, for that during his life they could not be heirs, so it must be intended after his death, and the rather because it is in the case of an use, which are to be construed to serve the party's intent, 228, 229, 230

H. covenants to stand seised, after his death, to the use of *J. D.* *H.* hath a fee-simple till his death, by *Hale* chief justice, 230

H. covenants to stand seised to the use of himself for life, remainder to the use of strangers, and their heirs, during the life of *C.* Remainder to the sons of *C.* successively in tail-male, remainder to *E. B.* in tail. The covenantor dies before any sons of *C.* born, and after a son is born. If *E. B.* next in remainder shall have the lands presently, or shall stay till all issues be dead without issue male; and it seemed to the court, That this remainder to *E. B.* vests immediately after the death of *H.* tenant for life, 248, 249

USURY.

A T A B L E of &c.

USURY.

If the party who lends the money, contracts for more than for 6*l.* *per Cent.* all the assurance is void; but if he doth not contract for more than the statute allows, and after he will take more, the assurance shall not be avoided, but the party shall forfeit the treble value, *Page* 197

As if a man, when money was at 8*l.* *per Cent.* lends money and takes bond for the same, and then the statute of 12 *Car.* 2. is made, and he will continue the old interest upon that bond, the bond shall not be avoided by such acceptance of interest, but the party shall forfeit the treble value of the statute, *ibid.*

On an information upon the statute of usury, he who borrows the money may be a witness, after he has paid it, but not before, 191

UTLAWRY.

After utlawry in a personal action, and before seizure, the party outlawed levies a fine, the conusee shall retain against the king, otherwise if the seizure be before the fine levied, the king shall not be ousted of his pernancy, 17

The king may dispose of the land itself of a person outlawed, by the course of the *Exchequer*, *ib.*

The king's servant may be outlawed, 152

In a writ of error to reverse an outlawry, the same outlawry is no good plea, 462

WAGER of LAW.

WAGER of law lieth of a debt recovered in a court baron, *Page* 386

In debt for 4*l.* recovered in a court-baron, for damages and costs there, in an action for words, the defendant offered to wage her law; and it seemed clear to the court, That though wager of law do lie of a debt recovered in a court-baron, yet it seemed to them, That that shall be intended of a debt originally sued for there, 386

But in the aforesaid case, no wager of law could have been upon the original action, because there is an injury supposed in the defendant, in which case no wager of law lies, and therefore the court refused her waging law in that case, *ibid.*

WALES, vide TRIAL.

An original writ out of the Chancery here doth not run in *Wales*, but a writ of execution doth, 206

By the statute of 27 *Hen.* 8. *cap.* 26. *Wales* is made part of the realm of *England*, *ibid.*

By the statute of 1 *Edw.* 6. *cap.* 10. the sheriffs of *Wales* ought to have their deputies in the courts at *Westminster*, *ibid.*

By the statute of 34 & 35 *Hen.* 8. *cap.* 26. all process for weighty causes shall be directed into *Wales* by the chancellor and council, which is intended the judges, *ib.*

An *Elegit*, *Fieri fac.* and a *Certiorari* lies into *Wales*, *ibid.*

F I N I S.



